



In the Matter of

RICHARD SIPES,

Complainant,

v.

ARB CASE NO. 98-004

ALJ CASE NO. 95-TSC-15

DATE: October 30, 2000

**ARCTIC SLOPE INSPECTION SERVICES,
ALYESKA PIPELINE SERVICE COMPANY,
and CHRISTIAN ENGINEERING d/b/a VECO
ENGINEERING, INC.,**

Respondents.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Complainant Richard Sipes:

Randall G. Simpson, Esq., *Jermain, Dunnagan & Owens, P.C., Anchorage, Alaska*

For Respondent Arctic Slope Inspection Services:

Gregory L. Youngman, Esq., *DeLisio Moran Geraghty & Zobel, Anchorage, Alaska*

For Respondent Alyeska Pipeline Service Company:

Lawrence R. Trotter, Esq., *Alyeska Pipeline Service Company, Anchorage, Alaska;*
Robert E. Jordan III, Esq., Morgan D. Hodgson, Esq., Samuel T. Perkins, Esq., *Steptoe & Johnson, L.L.P.,*
Washington, D. C.

For Respondent Christian Engineering d/b/a Veco Engineering, Inc.:

Mary L. Pate, Esq., *Eide & Miller, Anchorage, Alaska*

DECISION AND ORDER

This case arises under the employee protection provisions of the Toxic Substances Control Act of 1976, 15 U.S.C.A. § 2622 (1998); the Clean Water Act, 33 U.S.C.A. § 1367 (1986); and the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i)(1) (West Supp. 2000). The Administrative Law Judge issued a Recommended Decision and Order finding that Complainant

Richard Sipes failed to establish that Respondents discriminated against him and dismissed the complaint.

We adopt the ALJ's well-reasoned Recommended Decision and Order and attach a copy hereto.

SO ORDERED.¹

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

¹ Board Member Cynthia L. Attwood did not participate in the consideration of this case.



Date: October 6, 1997

Case No. 95-TSC-15

In the Matter of

RICHARD SIPES,
Complainant

v.

ARCTIC SLOPE INSPECTION SERVICE ("ASIS"),
ALYESKA PIPELINE SERVICE COMPANY, and
CHRISTIAN ENGINEERING d/b/a VECO
ENGINEERING COMPANY
Respondents

APPEARANCES:

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for complainant

Robert E. Jordan, III, Esq.
Kenneth L. Miller, Esq.
Lawrence Trotter, Esq.
for Alyeska Pipeline Service Company

Gregory Youngmun, Esq.
David D. Floerchinger, Esq.
for Arctic Slope Inspection Services, Inc.

Mary Pate, Esq.
for Christian Engineering/VECO Engineering

BEFORE: EDITH BARNETT
Administrative Law Judge

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[Editor's note: first column of page numbers relates to the original bench opinion; page numbers in second column brackets relate to this document]

RECOMMENDED DECISION AND ORDER

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Procedural History

On November 14, 1994, Richard Sipes (“complainant”) filed a complaint with the Secretary of Labor, alleging a violation of the employee protection provisions of the Toxic Substances Control Act of 1976, 15 U.S.C. § 2622 (“TSCA”); the Clean Water Act (“CWA”), 33 U.S.C. § 1367; and the Safe Drinking Water Act (SWDA), 42 U.S.C. § 300j-9(i)(2)(A). He alleged that he had formerly been employed by respondent Alyeska Pipeline Service Company (“Alyeska”) through respondent Arctic Slope Inspection Services Company (“ASIS”), an Alyeska contractor, as a Level I ultrasonic testing (“UT”) technician gathering corrosion data to determine whether the Trans-Alaska pipeline was in danger of rupturing. He alleged that, during the course of his employment, he observed falsification of such data by Harry Hawkins, a Level II lead technician also employed by ASIS, and that, after he reported this information to management officials and to state and federal regulators, he was harassed and intimidated by Hawkins, by Jim Schaeffer, of ASIS, and by Gary Hale of VECO Engineering (“VECO”), and removed from his position on the PITBUS crew. Although he was then given other assignments on the pipeline, he was ultimately terminated. He alleged that, as a result of this alleged retaliation, his health deteriorated to the point where he had to rely on medication and seek psychiatric treatment. He also alleged that ASIS failed to consider him for rehire or reemployment as a result of his having engaged in protected activity.

On July 13, 1995, the Seattle, Washington Wage-Hour Division Office issued a letter finding a violation of the statutes, and assessing each of the three respondents equally for pay, benefits, and attorney fees. All respondents appealed and requested a hearing. A hearing was held before the undersigned on June 10-14, 1996 in Anchorage, Alaska. Numerous exhibits, some duplicative (See Transcript (“Tr.”) 7-11) were received in evidence from all three respondents and the complainant, and are designated as Aly. Ex. (Alyeska Exhibits), VECO Ex. (VECO Exhibits), ASIS Ex. (ASIS Exhibits) and Pl. Ex. (Complainant’s Exhibits). The following witnesses testified at the hearing: complainant, Lowell Bassett, William “Billy” Carver, John Dayton, Michael Engblom, Kirk Hastain, Dr. Marguerite McIntosh, Curtis Sipes, Kris Spaid, Mike Stevens, and Shawn Zuke. (Tr. 1-1655). The following witnesses testified by videotaped deposition: Nelson “Bud” Hawkins (no relation to Harry Hawkins), Harry Hawkins, Darrell “Rusty” Hammond, Brian J. Stickler, Donald Erickson, Craig Miller, Robert Dullanty, and Brett R. Tyner. (Tr. 2001-2527; Pl. Exs. 124, 125). The following witnesses testified by stenographically recorded deposition: Dr. Magee² and a medical and vocational rehabilitation

²The records and deposition of complainant’s psychiatrist Dr. Jeffrey Magee (Pl. Ex. 105, Aly. Exs. 277-278) are subject to a protective order approved on May 10, 1996. Pursuant to 18 C.F.R. § 18.56, they have been filed in a separate file and designated as a restricted access portion of the record.

specialist retained by Complainant. (Aly. Ex. 265; 277). The record was closed as of August 1, 1996.³ All parties filed post-hearing briefs and proposed findings of fact and conclusions of law, which have also been considered

2. Parties

Alyeska is a company which operates and maintains the Trans-Alaska Pipeline System for seven owner companies: BP Pipelines (Alaska), Inc.; ARCO Transportation Alaska, Inc.; Exxon Pipeline Company; Mobil Alaska Pipeline Company; Amerada Hess Pipeline Corporation; Phillips Alaska Pipeline Corporation; and Unocal Pipeline Company. (ALJ Ex. 4 at 1; Dayton Tr. 1174-1176). The Trans-Alaska Pipeline System consists of the Valdez Marine Terminal, where oil is loaded on tankers for transport, and the 800-mile long pipeline running from Prudhoe Bay, on the North Slope of Alaska, to Valdez, on Prince William Sound. (Dayton ALJ Ex. 5; Tr. 1175-1176). During 1993 and 1994 the pipeline had eleven operating pump stations. (ALJ Ex. 4 at 24-25, 58-65, 72; ALJ Ex. 5; Dayton Tr. 1175-1176). Alyeska maintains and operates the Trans-Alaska Pipeline System pursuant to the Agreement and Grant of Right of Way for the TransAlaska Pipeline between Alyeska and the United States of American (“the Pipeline Agreement”). The Pipeline Agreement requires Alyeska and its contractors to operate in accordance with applicable environmental standards and to minimize degradation of air, land, and water quality. (Aly. Ex. 274 at 5-6; Dayton Tr. 1193).

VECO is an Alyeska contractor which has performed general engineering services on the pipeline, including corrosion engineering, since December 1993. (ALJ Ex. 8 (VECO Contract); Miller Tr. 2320-2322). VECO subcontracts with other companies for assistance in meeting some of its engineering responsibilities to Alyeska, including CORRPRO, for corrosion engineering, and Peratrovich, Nottingham & Drage (“PN&D”) for marine engineering. (Miller Tr. 2317-2323; ALJ Ex. 8 (VECO-CORRPRO Subcontract)).

ASIS is a wholly-owned subsidiary of ASCE, Inc., which is, in turn, a wholly-owned subsidiary of Arctic Slope Regional Corporation, one of the thirteen native regional corporations established under the Native Claims Settlement Act. All of the stock of Arctic Slope Regional Corporation is held by the Inapt shareholders of the North Slope. (Larson Tr. 1393). Since June 14, 1993, ASIS has provided corrosion inspection and testing of the pipeline and its pump stations to Alyeska pursuant to contract. (ASIS Ex. 78). ASIS was the complainant’s direct employer.

The complainant, Richard Sipes, was born in Flint, Michigan in 1965. He and his family moved to Alaska in the Spring of 1981. His family is close and supportive. He currently resides at home with his parents and three sisters in Kenai, Alaska. His parents do not work. Curtis

³ Because of transcription errors in the original transcript by the court reporting service, particularly on June 14, 1996, a corrected transcript was secured. This transcript, which was re-paginated, was not received until after the parties had completed part of their post-hearing briefing.. Because of the time and expense to the parties of changing page references, the corrected transcript has not been utilized. The citations in this decision refer to the original transcript. A two-page excerpt from an unofficial transcript secured by the respondents has been received in evidence as ALJX 9 to supplement the original transcript.

Sipes, complainant's brother, has been employed by ASIS since 1990. At the time of the hearing, he was a Level II lead NDE technician at the Valdez marine terminal. He contributed more than half of his annual income to support his parents, brothers and sisters in 1994 and 1995, and declares his parents as dependents on his tax returns. (C. Sipes Tr. 128-30, 104-110, 115, 130; R. Sipes Tr. 207-208). Curtis Sipes testified on complainant's behalf in this trial.

3. Corrosion Inspection on the Pipeline

ASIS maintains a pool of technicians qualified in various inspection disciplines such as ultrasonic testing, who are hired for specific inspection projects during seasonal construction periods. The company has an established policy that, if no other work is available after these projects are completed, the technicians are then moved into layoff status, where they are eligible for rehire if appropriate work becomes available. If not recalled to active employment by June 30 of the following year, they are then terminated. (Carver Tr. 872, 886-889; Larson Tr. 1395-1397, 1405-1406; Stevens Tr. 477; Dayton Tr. 1188-1189; ASIS Ex. 1 at 0083-0085).

ASIS uses five levels of technicians for ultrasonic testing work. Such testing is only one method of non-destructive examination (NDE), also known as non-destructive testing (NDT), performed by its technicians. Other methods of NDE include radiography, magnetic particle, eddy current, liquid penetrant, and visual inspection. (H. Hawkins, Pl. Ex. 125 at 7-9). The levels for UT technicians are: Trainee, Level I, Level II-T, Level II, and Level III.

- (1) A Trainee must be a high school graduate or equivalent, and complete 40 hours of classroom training. A trainee is only authorized to work under direct supervision. (Aly. Ex. 8 ¶ 5.1.1 & Attachment A).
- (2) A Level I technician is a trainee who has completed 3 months of on-the-job training, taken 40 hours of classroom training and passed an examination. A Level I is generally not permitted to perform tests independently and usually acts as an assistant to a Level II. (Aly. Ex. 8 ¶ 5.1.2 & Attachment A; Engblom Tr. 1090-1091; Zuke, Tr. 979-980; H. Hawkins, Pl. Ex. 125 at 34, 65-66; Pl. Ex. 47 at 11).
- (3) A Level II-T technician must have 6 months of on-the-job training as a Level I and an additional 40 hours of classroom training. The only UT work that a Level II may perform independently is thickness readings and straight beam or longitudinal wave examination of material. Flange testing is not authorized. (Aly. Ex. 8 ¶ 5.1.3 & Attachment A; Engblom Tr. 1091; Carver Tr. 937; B. Hawkins Pl. Ex. 124 at 125-126). A flange is the surface where different pipeline components such as a valve and piping are mated by means of a seal or gasket. (Stickler Tr. 2115-2116).
- (4) A Level II technician must have 9 months of on-the-job training as a Level II-T and an additional 40 hours of classroom training. He or she can independently set up and calibrate UT equipment, perform UT testing, interpret and report UT

results, and perform shear wave examination on flanges. Shear wave examination is an advanced UT technique requiring the use of a manual scanner. (Aly Ex. 8 ¶ 5.1.3 & Attachment A; Engblom Tr. 1095-1097; B. Hawkins, Pl. Ex. 124 at 63-64).

- (5) A Level III technician must have 1 to 4 years of on-the-job training as a Level II technician and pass an examination. (Aly Ex. 8 ¶ 5.1.4, 6.3-6.3.3). An individual certified as a Level II can be designated as a “Corporate Level III” by a fully certified Level III technician to administer tests to NDE Level I and II technicians, but must work as a Level II. (C. Sipes Tr. 36-38, 42; Engblom Tr. 1089).

4. The PITBUS program

The PITBUS was new to the Alyeska corrosion monitoring program in 1994. It was a school bus-like vehicle that functioned as a mobile corrosion testing and monitoring station. Before the PITBUS, the ASIS UT technicians did most of their corrosion testing using manual equipment. Typically, they loaded all their gear in a vehicle such as a Suburban, and traveled from location to location, taking the data and storing it in their hand-held data loggers. They then physically transported the data loggers back to the offices of the site engineers (also known as corrosion field engineers), who downloaded the data into their computers for analysis. The PITBUS program started because of the new automated UT technology available which, in contrast to the traditional manual UT equipment, produced highly accurate and repeatable results. (H. Hawkins, Pl. Ex. 125 at 25-27, 57, 61-62).

Site engineers Jim Schaeffer, Paul Lott, Brian Stickler, Ray Grippin and Gary Hale, who headed up the project, worked with Kirk Hastain, the Alyeska lead corrosion engineer, to develop a self-contained moveable unit, which carried all the inspection equipment necessary to perform corrosion testing and analysis on the pipeline, especially using the newly-developed automated equipment. The result was that inspection and testing equipment did not have to be strung all over the place in the rain and snow. In addition, the site engineers could travel with the UT crew, and could work together with the lead UT technician in the office component of the PITBUS using computer equipment networked for data collection and analysis. (Stickler Tr. 2093-2094, 2107-2108; H. Hawkins, Pl. Ex. 125 at 28-29, 170-172; Hammond Tr. 2047).

The normal schedule for the PITBUS crew was seven days a week, 12 hours a day, in alternating three week shifts. (B. Hawkins, Pl. Ex. at 41-42; H. Hawkins, Pl. Ex. 125 at 31-32). The PITBUS was typically staffed with four people. The site engineer analyzed the corrosion data in the office portion of the PITBUS. Two UT technicians, one certified as a Level II who served as the lead UT worker, and the other certified as a Level I, Level II-T, or Level II, gathered the corrosion data by measuring the residual thickness of the pipe to determine where the pipe was most badly corroded. A laborer did any unskilled physical work required. (B. Hawkins Pl. Ex. 124 at 106-107; Stickler Tr. 2162-2163).

The UT technicians working on the PITBUS were supervised by and reported to Rusty Hammond and Don Erickson, the ASIS corrosion inspection coordinators based in Fairbanks,

Alaska. The coordinators did not have the authority to hire or fire the technicians. Hammond and Erickson, who worked alternate two week shifts, in turn reported to William (“Billy”) Carver, the ASIS General Manager, who was located in Anchorage, Alaska, and did have hiring and firing authority. (Hammond, Tr. 2007, 2012, 2017; Erickson, Tr. 2236-2238, 2240, 2281-2282, 2294; Carver, Pl. Ex. 71 at 2). The site engineers, Brian Stickler and Ray Grippin, were employed by CORRPRO and reported to Gary Hale, the VECO Engineer assigned to the PITBUS operation as field supervisor. Hale was the only VECO employee associated with the PITBUS. (Miller Tr. 2338; Stickler Tr. 2117, 2149-2150; Larson Tr. 1597). He was physically located in Anchorage during most of this time period, and was on the PITBUS a total of two to four times while Sipes worked there. (R. Sipes Tr. 758; Stickler Tr. 2110, 2146-2148). Hale in turn reported to Kirk Hastain, the Alyeska engineer responsible for Alyeska's corrosion monitoring program. Hastain had “final authority on any and all issues” and determined “overall objectives for the [PITBUS] program” for Alyeska. (VECO Ex. 89; Hastain Tr. 1210-1212, 1218, 1220-1221). Brian Stickler’s supervisor at CORRPRO was Bill Mott, but Stickler reported to Gary Hale for purposes of the PITBUS work. Hastain had given Hale the title of supervisor of the PITBUS program, and Stickler the title of back-up supervisor. (Stickler Tr. 2146-2147, 2182-2184).

Alyeska wanted the most accurate corrosion data available, because even pinhole corrosion could lead to a leak and possible fracture of the pipeline. (C. Sipes Tr. 59). The ultimate objective of inspecting the pipeline for corrosion was to prevent corrosion from getting to the point where there would be a risk of an actual leak. (Stickler Tr. 2101). The UT technicians on the PITBUS used two instruments, an automated scanner and a manual scanner, to inspect the pipeline for corrosion. Grids were painted on the pipe to be inspected, with alphabetic and numeric coordinates, and dots, or data points, centered in each block one inch apart. The number of data points, also known as grid points, could vary widely from grid to grid, but the grids used for the automated equipment were uniformly 12" long by 13" wide. (See Aly. Ex. 279-282; Stickler Tr. 2141-2145, 2195). The corrosion engineer could extend the grids if necessary to encompass additional piping. (Aly. Ex. 2 at 6; ASIS Ex. 5 at 0329).

The automated ultrasonic inspection equipment (also referred to as AUT) was new and not generally used until 1993. The automated scanner consisted of a robotic arm with magnetic wheels weighing about 40 pounds, which was mounted on the pipe on each grid to take the thickness readings. The automated scanner was tended by an assistant such as a Level I technician, who repositioned the scanner after completion of each grid. The scanner was attached to a cable, referred to as an umbilical cord or life line, which led to a computer located inside the PITBUS up to 100 feet away from the pipe being scanned. The Level II technician watched the readings being displayed on the computer terminal in the office part of the PITBUS and maintained radio contact with the assistant to ensure that the scanner was functioning correctly, e.g. had not fallen off the pipe being scanned. The computer displayed the readings and stored the data for immediate analysis by the CORRPRO site engineers.

The manual equipment had to be used for inspecting welds and tight places such as piping located within six inches of the edge of a support. When using the manual scanner, the Level II technician took readings by pressing a single transducer (the sensor that transmits pulses

of ultrasound into the material being measured) against the dots in the grid painted on the pipe. He then moved the transducer in a circular motion about a half inch around each dot to find the lowest wall thickness reading associated with that dot. The transducer was connected to a meter which displayed the thickness readings. It was also connected to a data logger, which, when a button was pushed, stored the readings. Readings could also be input manually, i.e. “punched in”. In order to facilitate use of the manual scanner, which was awkward for only one person to operate, the Level II held the transducer and the meter while an assistant such as a Level I technician punched the button on the data logger as directed to record the lowest thickness readings for each dot.

The automated system was faster, more accurate and more reliable than the manual system. It had multiple transducers and took 64 thickness readings per square inch compared to four readings per square inch for the manual scanner. Because of variations among technicians in the amount of pressure on the transducer, and differences in techniques such as taking the reading right on top of the dot instead of going around the dot, readings from the manual scanner were almost not repeatable from technician to technician. (B. Hawkins Pl. Ex. 124 at 29-41, 110-111, 145, 180-182; H. Hawkins Pl. Ex. 125 at 40-62; C. Sipes Tr. 48-50, 92-95; Stickler Tr. 2092-2093, 2097-2099; Aly. Exs. 219-228).

The overall expense of the PITBUS to Alyeska for personnel and other operating costs was expected to be approximately \$1 million in 1994. (Hastain Tr. 1259-1260). The PITBUS cost approximately \$250 per hour to run. (Pl. Ex. 62 at 1).

5. Complainant’s Work on the PITBUS from April to May, 1994.

Beginning in 1993, complainant worked for ASIS performing radioactive and ultrasonic testing, as Harry Hawkins’ trainee. (R. Sipes, Tr. 218-220; Pl. Ex. 6; H. Hawkins Pl. Ex. 125 at 64). In January of 1994, complainant passed the test for Level I UT technician. (Tr. 235-238, Pl. Ex. 6). He worked in Valdez at the terminus of the pipeline from March 10, 1994 through March 31, 1994. (Tr. 238-39). During this period of time, complainant also worked for another inspection services company, CTI of Alaska, in his hometown of Kenai, Alaska, when ASIS had no work for him. (Pl. Ex. 6 at 9-18, 49; R. Sipes Tr. 215-221, 228-229, 616). The work for CTI had nothing to do with Alyeska or the Trans-Alaska pipeline. (Pl. Ex. 6 at 49; R. Sipes Tr. 207).

From February to April 1994 the PITBUS was outfitted in Anchorage with appropriate furnishings and equipment. (Stickler Tr. 2095-2096; Aly. Exs. 219, 227, 228). In April, 1994, at the behest of Harry Hawkins, complainant was contacted by Rusty Hammond and Rod Mitchell of ASIS to help start up the operation of the PITBUS with Bud Hawkins, a Level II technician. (R. Sipes Tr. 149-153; B. Hawkins Pl. Ex. 124 at 119; H. Hawkins Pl. Ex. 125 at 32-33). From April 13, 1994 through April 19, 1994, complainant worked with Bud Hawkins in Anchorage preparing the PITBUS for its first field assignment and putting on a demonstration for Alyeska management of the PITBUS’ capabilities. (Aly. Ex. 4 at 00048-00049; R. Sipes Tr. 253-256; B. Hawkins Pl. Ex. 124 at 30-32 .

On April 20, 1994, the PITBUS began its first field assignment. Complainant and Bud Hawkins accompanied the PITBUS from Anchorage to Pump Station 11. (R. Sipes Tr. 255-256; Aly. Ex. 4 at 00049; Aly. Ex. 279 at 06008, 06005-06007; Stickler Tr. 2137-2138).

On April 21, 1994, Alyeska issued Work Order No. 8419 to ASIS requesting ASIS to provide two UT technicians, minimum Level II, to the PITBUS project. The work order was prepared by Richard Lawson, a PATSCO employee acting as Senior Quality Control Engineer ("QCE") for Alyeska. (VECO Ex. 27 at 1; Pl. Ex. 64; Aly. Ex. 65 at 03673). ASIS supervisor Rusty Hammond then requested permission to continue using complainant on the PITBUS despite his Level I certification, because complainant was already in the field working with Bud Hawkins. On April 25, 1994, Lawson granted permission by PROFS (e-mail), as follows:

Rusty, it was an omission when I completed the work order. I should have included a statement that the use of a Level One is acceptable with the concurrence of the QCE. I have reviewed R. Sipes background and he is acceptable for use on this project as a Level I. Sorry for the confusion. I should have read the W.O. a little closer.

(Hammond Tr. 2024-2027; Pl. Ex. 59).

On April 23, 1994, complainant and Bud Hawkins moved with the PITBUS from Pump Station 11 to Pump Station 10. (Aly. Ex. 4 at 00049; R. Sipes Tr. 256-257, 263; Aly. Ex. 4 at 00049; Aly. Ex. 279 at 05997). On April 26, 1994, Harry Hawkins replaced Bud Hawkins as the lead ASIS UT technician working on the PITBUS with Sipes. Aly. (Ex. 279 at 05994; R. Sipes Tr. 256-257). Bud Hawkins and Shawn Zuke, a Level II-T technician, were assigned to the alternate three-week shifts. (B. Hawkins Pl. Ex. 124 at 133, 176; Erickson Tr. 2239). Harry Hawkins, a Level II NDE technician, was experienced in the fields of ultrasonics, radiography, magnetic particle, and liquid penetrant testing. (H. Hawkins, Pl. Ex. 125 at 7-20). In the past, he had served as the Corporate NDE Level III for ASIS. In that capacity, his duties included ensuring that ASIS had in place, and followed, proper procedures for qualifying and certifying NDE personnel. (Engblom Tr. 1089-1090; H. Hawkins Pl. Ex. 125 at 13-19).

Harry Hawkins and complainant worked together performing testing at Pump Station 10 from April 26, 1994 through May 10, 1994. (Aly. Ex. 279, UT Field File Records for Pump Station 10). The piping they inspected measured from 1/2 to 40 inches in diameter, and most of it contained oil. (R. Sipes Tr. 263-264). Complainant asserts that, during this two week period, Harry Hawkins scanned grids too quickly and told him to punch in the prior year's test readings for 1993 for certain grid points, when Hawkins could not find the thinnest spot in the grid point or did not want to take the time to find the thinnest spot. (R. Sipes Tr. 287, 411, 421, 433; H. Hawkins Pl. Ex. 125 at 7-20). Complainant testified that he confronted Harry Hawkins about these testing procedures and that Harry Hawkins responded by threatening to have him fired or to "kick his butt." (R. Sipes Tr. 287-288, 416). Harry Hawkins flatly denies that he used improper testing procedures or threatened the complainant. (H. Hawkins Pl. Ex. 125 at 83, 137-139).

There was testimony against Harry Hawkins by various coworkers in support of complainant's charges. Since much of this testimony was hearsay, it is entitled to little weight. Curtis Sipes, complainant's brother, testified that complainant had told him, while they were

working at Pump Station 10, that Hawkins had him punch in data from the previous year because he did not want to spend time looking for the lowest thickness. Curtis Sipes also testified that, in 1991 and 1992, when working with Harry Hawkins prior to the time ASIS was awarded the Alyeska inspection contract, Hawkins had threatened him with firing and had used improper procedures on two separate jobs. (C. Sipes Tr. 46-56, 62, 65).

Bud Hawkins testified that, as ASIS' Acting Level III UT technician, Harry Hawkins had certified him as having taken 8 hours in flange training when, in fact, Harry had only given him 20 minutes of such training. Bud testified that he had also heard Harry brag that he could have people fired simply by calling Jim Schaeffer. He was not aware of anyone who had been fired by Schaeffer at Harry's behest, nor had he heard Carver or Schaeffer indicate that they wanted to get rid of the complainant. In his opinion, Harry had a history of doing shoddy work, and was always in a hurry to get his work done. Bud admitted that he had not personally seen Harry perform shoddy work, however. (B. Hawkins Pl. Ex. 124 at 52, 54, 71, 120, 128, 137, 152-153, 157-158; 173-174; ASIS Ex. 6 at ASIS 0436).

Similarly, Shawn Zuke testified that, in her opinion, Harry Hawkins used an incorrect scanning technique and that he had threatened her with firing. (Zuke, Tr. 985-986). Zuke was good friends with Bud Hawkins, however, and had worked with him previously. (Zuke, Tr. 1043-1050). Kris Spaid testified that he had unpleasant experiences with Harry Hawkins in 1992. (Spaid, Tr. 142-156). Spaid admitted, however, that he had no personal knowledge of what happened in connection with Richard Sipes and Harry Hawkins on the PITBUS. (Spaid, Tr. 169-170). Spaid is also a friend of Curtis Sipes and lives at his apartment in Valdez when he works in Alaska. (C. Sipes, Tr. 112-115; Spaid, Tr. 181).

Bud Hawkins returned for his three-week shift on the PITBUS on May 16, 1994, and Harry Hawkins rotated off duty. On the evening of May 17, 1994, when Bud Hawkins and Complainant were driving back to Fairbanks from Pump Station 10, complainant told him that Harry Hawkins had directed him to punch in last year's data. Bud Hawkins encouraged complainant to report the situation to higher Level ASIS management, so they met with ASIS supervisor Rusty Hammond when they reached Fairbanks. (R. Sipes Tr. 433-435; B. Hawkins Pl. Ex. 124 at 44-47, 150). Complainant reported that Harry Hawkins had asked him to punch in last year's data for the grids on which they were performing UT testing at Pump Station 10. (Hammond Tr. 2009-2010; R. Sipes Tr. 433-437). Bud Hawkins also complained that Harry Hawkins had left too many time-consuming manual UT inspections for him to complete at Pump Station 8. (Hammond, Tr. 2008-2009; B. Hawkins, Pl. Ex. 124 at 44-46, 150-154). Bud Hawkins and Harry Hawkins did not like each other. (B. Hawkins Pl. Ex. 124 at 128-129, 134, 170-171; Zuke Tr. 1049-1050). Bud Hawkins was also concerned that "he would look bad" if Harry Hawkins, his alternate, was more productive than he was, in terms of grids inspected, during a shift. (B. Hawkins Pl. Ex. 124 at 175-177; Hammond Tr. 2008-2009; Carver Tr. 809-813; Zuke Tr. 1042-1043; H. Hawkins Pl. Ex. 125 at 79-80).

Hammond stated that he wished to talk to Harry Hawkins to get his side of the story before contacting General Manager Carver to set up a meeting. (B. Hawkins, Pl. Ex. 124 at 154-156; Hammond Tr. 2010-2012). Hammond was unable to reach Harry Hawkins. In the

following week Hammond rotated to off-duty status and his alternate, Don Erickson, came on duty. (Hammond Tr. 2012-2013). Complainant also rotated off duty. (R. Sipes Tr. 437; Aly. Ex. 4 at 00053). Bud Hawkins then contacted Erickson, and asked that his complaints and those of complainant concerning Harry Hawkins be brought to the attention of ASIS General Manager Carver. Erickson then called Carver. (Erickson Tr. 2240; Carver Tr. 789-791).

6. The PITBUS meeting of June 6, 1994

Carver arranged to meet in Fairbanks with all four of the ASIS UT technicians assigned to the PITBUS -- Shawn Zuke, Bud Hawkins, Harry Hawkins and the complainant --, on the date of their next scheduled shift change on June 6, 1994. Carver's purpose was to find out what was going on and to get the PITBUS crew working productively together again. (Carver Tr. 798). ASIS Corporate Level III Jim Schaeffer and ASIS supervisor Erickson also attended. (Zuke Tr. 987-989; R. Sipes Tr. 438-441; Erickson Tr. 2240-2241; H. Hawkins Pl. Ex. 125 at 69-72; ASIS Exs. 13, 14). No one from Alyeska or VECO attended. (Carver Tr. 793-798, 889; Erickson Tr. 2240).

Complainant testified that Harry Hawkins pulled him aside just before the meeting and said "[i]f I am going down, you're going to go down, too." (R. Sipes Tr. 441-443, 445). Harry Hawkins denied threatening Complainant and testified that he had only asked him what was going on. (H. Hawkins Pl. Ex. 125 at 127-129, 183-184). Nobody else heard what was said between Harry Hawkins and Richard Sipes before the meeting. (R. Sipes Tr. 443; Zuke Tr. 990-991; B. Hawkins Pl. Ex. 124 at 48-50; Carver Tr. 799-800). Bud Hawkins testified that he had seen Harry Hawkins confront complainant in the hallway after calling him out of the room where they were standing, and point a finger in his face, and that when complainant came back in the room, he was shaking. (B. Hawkins Pl. Ex. 124 at 48-49, 90-91). Billy Carver testified that complainant said Harry Hawkins had told him that he better be quiet or they could both be fired. Complainant then pulled out a tape player and pushed the play button, at which point Harry Hawkins displayed concern. When only static was heard, Hawkins stopped looking concerned and said something like "it didn't record." Based on this interplay, Carver concluded that Harry had intimidated complainant prior to the meeting. (Carver Tr. 800-804; Carver Pl. Ex. 71 at 1-2).

According to Carver, Shawn Zuke stated that Harry had bet \$500 he could get her fired. Complainant also stated that Harry had said he could get him fired through Jim Schaeffer. Carver assured the group that no one could fire them except him. (Carver Pl. Ex. 71 at 2).

Complainant also stated that Harry Hawkins was not following proper inspection procedures, was scanning grid points too fast, and was having him enter false data readings by using prior year's data when Hawkins had trouble finding the thinnest area of pipe at a grid point. (Carver Pl. Ex. 71; Zuke Tr. 991-992; H. Hawkins Pl. Ex. 125 at 173-175; R. Sipes statement, ASIS Ex. 6). Harry Hawkins admitted that his primary focus was scanning the grids quickly and that he was used to working this way from his experience with the Kenai operation of ASIS. (Zuke Tr. 993-995). Jim Schaeffer, the ASIS Corporate Level III, became personally involved. According to Bud Hawkins, Jim Schaeffer was known to be Harry Hawkins' best friend, and was responsible for getting Harry his job at ASIS. Jim Schaeffer was, however, also responsible for

getting complainant his job at ASIS as well. (B. Hawkins Pl. Ex. 124 at 91; H. Hawkins Pl. Ex. 125 at 19; C. Sipes Tr. 73).

According to Bud Hawkins, after he sat down at the meeting, Schaeffer immediately “lashed out” at him for “causing this whole thing” and stated that he had never wanted him on the job. Schaeffer also made statements to complainant that Carver perceived as disruptive. (B. Hawkins Pl. Ex. 124 at 51-52, 92, 183-184; Carver Tr. 807; Carver Pl. Ex. 71 at 1-2). Carver’s view was that the issue was not falsification of data, but a difference in style and perception, that Harry Hawkins’ standards were within the defined tolerance, and that Bud Hawkins was more of a perfectionist than Harry Hawkins. (Carver Pl. Ex. 71 at 2). Carver also felt that Harry probably had harassed complainant and that Harry is hard to work with.

In Erickson’s observation, all the group members were disgruntled with each other. (Erickson Tr. 2257). Harry and Bud Hawkins, Zuke and Complainant did express a desire to try to work out their differences and to continue to work together on the PITBUS. They prepared and signed a document entitled "Rules for Improvement" setting forth goals that they would each attempt to meet in working together in the future. The goal for communication was as follows:

- a. Personal respect of fellow employees!
- B. Go to the source!
- C. Stop the rumors.

(ASIS Ex. 12; Carver Tr. 889-892; Zuke Tr. 1006-1008, 1065-1067; B. Hawkins Pl. Ex. 124 at 162-163; R. Sipes Tr. 717-719). It was agreed that Bud Hawkins, Zuke and Complainant would each work a one-week shift with Harry Hawkins during the following three-week period. (ASIS Ex. 14; Erickson Tr. 2240-2257, 2289-2292; R. Sipes Tr. 443-446, 715-716; Zuke Tr. 991-992, 995-997, 1036, 1057-1058; B. Hawkins Pl. Ex. 124 at 50-57, 85-86, 130-135, 165-166; H. Hawkins Pl. Ex. 125 at 72-77; Carver Tr. 804-820, 838-839; Stickler Tr. 2120-2121).

Those involved in the June 6 meeting agreed to keep it confidential. (Carver Tr. 891-892; Zuke Tr. 996-997, 1072-1073; Larson Tr. 1429; R. Sipes Tr. 447). Later that day, however, when they arrived on site at the PITBUS, which was then at Pump Station 8, according to Brian Stickler, the CORRPRO site Engineer then assigned to the PITBUS, Harry Hawkins told him that allegations had been made against him by Complainant, Zuke and Bud Hawkins, but did not go into the details. (Stickler Tr. 2119, 2122, 2178). Harry Hawkins denied telling Stickler anything. (H. Hawkins Pl. Ex. 125 at 145, 190-191). ASIS General Manager Carver informed Alyeska Corporate NDE Level III Mike Engblom of Complainant’s allegations some time in early June 1994. Engblom then passed on the allegations to VECO Supervisor Gary Hale who in turn passed them on to Alyeska Corrosion Engineer Kirk Hastain. (Engblom Tr. 1133-1135; 1137-1141; Pl. Ex. 70; Hastain Tr. 1228-1229, 1275).

Bud Hawkins left the June 6, 1994 meeting feeling that relationships among the four UT technicians had improved. (B. Hawkins Pl. Ex. 124 at 162-163). Harry Hawkins, on the other hand, testified that the meeting was “a witch hunt,” that the others at the meeting went at him like a “shark feeding frenzy,” that he was not given a chance to defend himself, and that he was innocent of all the charges against him. As to threatening and intimidating complainant, he

thought that was laughable given the difference in their sizes. He is 5'9" and weighs 195 pounds, while complainant is 6' 1" or 6' 2" and weighs between 300 and 375 pounds. (H. Hawkins Pl. Ex. 125 at 103, 138; B. Hawkins Pl. Ex. 124 at 77). Harry Hawkins testified that he had met complainant in 1990 on a social basis, had helped complainant get his job with ASIS, had worked with him as a trainee in 1993, and had heard complainant say several times that he would like to sue a company such as Alyeska and live off the proceeds of the money he would receive. (H. Hawkins Pl. Ex. 125 at 22-24, 64, 114-115, 116).

Harry Hawkins testified that he was surprised to be accused of not following procedures for proper data collection since he had written many of those procedures and had never in his career collected or reported data improperly or been accused of such. He also testified that it would take longer to punch in last year's data than to find the lowest thickness reading. (H. Hawkins Pl. Ex. 125 at 70-78, 82-3, 129, 138-139, 159, 177-178, 180, 201).

ASIS Corporate Level III Jim Schaeffer and ASIS supervisor Erickson felt that Harry Hawkins was treated unfairly at the meeting. Jim Schaeffer thought that the crew was making outrageous accusations and that the meeting was a finger pointing session. He saw Bud Hawkins as a trouble maker who had made similar charges against Ray Grippin, a site engineer, in 1993. He stated that he and Mike Engblom had found nothing to the charges against Grippin. He had recommended against rehiring Bud Hawkins because of these problems. (Schaeffer statement ASIS Ex. 6). Similarly, Erickson had never heard anything bad about Harry before the meeting and believed that he was a good technician. He was shocked and angered by the allegations. His impression of the meeting was that the group had personality problems and were accusing each other of anything they could think of. (Erickson Tr. 220-2292).

7. Complainant's work on the PITBUS from June 20-22, 1994.

For the three week shift beginning June 6, 1994, Stickler was the CORRPRO Corrosion Site Engineer assigned to the PITBUS. (Stickler Tr. 2120-2122, 2125-2126). From June 6, 1994 to June 12, 1994, Harry Hawkins, a Level II and Zuke, a Level II-T, were the two UT technicians on the bus. (Aly. Ex. 279, UT Field File Records for Pump Station 7; Stickler Tr. 2120-2121; Zuke Tr. 997.) From June 13, 1994 to June 19, 1994, Harry Hawkins worked with Bud Hawkins, who was also a full Level II technician. (Aly. Ex. 279 (UT Field File Records for Pump Station 7); Stickler Tr. 2122). On June 19, 1994, Bud Hawkins rotated off the PITBUS crew.

From May 26, 1994 until June 18, 1994, except for the one-day trip to Fairbanks for the June 6, 1994 PITBUS meeting, complainant worked at the Valdez Marine Terminal assisting ASIS Level II technicians Mike Stevens and Curtis Sipes, his brother. (R. Sipes Aly. Ex. 4 at 00054, 00056-57, 00059-60; Tr. 437-438, 447-448; Stevens Tr. 465-467). He returned to the PITBUS to work with Harry Hawkins doing UT testing at Pump Station 12 on June 20, 1994. (Aly. Ex. 4 at 00061; Aly. Ex. 279 (UT Field File Reports for Pump Station 12)). Complainant testified that, from June 20 to June 22, Harry Hawkins harassed him by saying that ASIS Corporate Level III Jim Schaeffer had determined that ASIS would switch from "days" to "hours" as the basis for counting on-the-job training for the purposes of advancement to higher NDE certification levels, which would make it more difficult for complainant to qualify for a

higher level certification. (R. Sipes Tr. 449-450; Carver Tr. 893-895). Complainant also testified that Harry Hawkins threatened him physically by saying "You're due for an accident" and "I don't think twice about shooting somebody that screws around with my family." (R. Sipes Tr. 451-454).

Harry Hawkins denied threatening complainant. (H. Hawkins Pl. Ex. 125 at 137-139). Brian Stickler, the CORRPRO site engineer who was also on the PITBUS during the June 20-22, 1994 period, testified that he saw nothing unusual in the interaction between Harry Hawkins and complainant. (Stickler Tr. 2122, 2156, 2226- 2227). He did hear from Hammond that complainant had called him at night during that period about harassment by Harry Hawkins. Hammond testified that complainant said Hawkins was getting short with him and belittling him, but said nothing about Hawkins physically threatening him. (Stickler Tr. 2129; Hammond Tr. 2015-2016).

On the evening of June 22, 1994, complainant telephoned ASIS General Manager Carver and reported that he felt harassed and wanted to return home. (Carver Tr. 895-897, 898-903; R. Sipes Tr. 454-455). Complainant did not tell Carver of the alleged threats of physical harm by Harry Hawkins. (R. Sipes Tr. 454-455). Complainant told Carver that he believed somebody was monitoring or using his electronic mail account. (Carver Tr. 895-897). He also complained that he was being treated coldly by Harry Hawkins and Stickler because, on the day the PITBUS had traveled from Fairbanks to Pump Station 12, they had not waited for him at McDonald's to have lunch and he had to drive the truck that pulled the PITBUS generator. (Carver Tr. 898-903; Stickler Tr. 2125-2127). Stickler testified that he and Harry Hawkins had already finished their lunch by the time Complainant arrived at the restaurant, and no coldness was intended. In addition, since there were four vehicles to be taken to the PITBUS, everyone had to drive one. The vehicle with the generator was perhaps the least favorite of the five to drive, however. (Stickler Tr. 2125-2127, 2180-2181).

8. Complainant's Departure from the PITBUS on June 22, 1994.

Carver urged complainant to stay with the PITBUS crew until a replacement technician could be secured. Nevertheless, complainant left immediately, without further notice. (Carver Tr. 895-903; R. Sipes Tr. 454-455; Hammond Tr. 2015-2017). With the exception of the PITBUS "closure" meeting on September 19, 1994, discussed below, complainant had no further contact with Harry Hawkins. (H. Hawkins Pl. Ex. 125 at 139).

When complainant left the PITBUS on June 22, 1994, he went directly from Pump Station 12 to his brother Curtis Sipes' home in Valdez. (C. Sipes Tr. 88). Curtis Sipes testified that his brother was "all shaken up, crying and such" and had never acted like that before. They did not discuss the details of the problem, because complainant was too upset. On June 23, 1994, complainant returned to his parents' home in Kenai. Curtis learned about the harassment and threats from his father in a telephone conversation later that day. Curtis then did not see complainant again until September 1994. He testified that he generally sees complainant only "every once in a great while." (C. Sipes Tr. 32, 34, 82-83, 117).

When Complainant failed to report for work on the PITBUS on June 23, 1994, ASIS General Manager Carver contacted ASIS Human Resources Manager LoAnn Larson. They decided to bring both complainant and Harry Hawkins to Anchorage for separate interviews. (Carver Tr. 903; Larson Tr. 1416-1417, 1420-1423).

Carver and Larson met with Harry Hawkins on Friday, June 24, 1994. (ASIS Ex. 15 at 0057-0061; Larson Tr. 1422-1436; Carver Tr. 904-907; Aly. Ex. 72 at 03683). Carver and Larson discussed Hawkins' style of dealing with lower level inspectors. (Larson Tr. 1432-33). They counseled Harry Hawkins that he had a harassing and intimidating style with coworkers and advised him to attend training on harassment. (Larson Tr. 1433, 1608-1610). They warned Hawkins that any further allegations of harassment or intimidation could be grounds for disciplinary action. (Larson Tr. 1435; Carver Tr. 904-907; ASIS Ex. 15 at 61; Aly. Ex. 72 at 03683).

Carver and Larson met with complainant on Monday, June 27, 1994. (ASIS Ex. 15 at 0045-0051; Aly. Ex. 72 at 03683; Carver Tr. 907-913; Larson Tr. 1418-1458). They told him they had met with Harry Hawkins. (ASIS Ex. 15 at 0045; Larson Tr. 1438). Carver assured complainant that he had done the right thing by bringing forward his concerns, that Harry Hawkins and Jim Schaeffer had no authority to terminate his employment and that Carver had heard positive things about complainant from the field engineers. (Larson Tr. 1439, 1446; ASIS Ex. 15 at 0045-0051). Complainant told Carver and Larson that Harry Hawkins should be given a second chance, and should not be terminated. (Larson Tr. 1447-1449; ASIS Ex. 15 at 0048). The meeting ended with the agreement that complainant would take several weeks of sick leave. Thereafter, if ASIS was not ready to return him to his position on the PITBUS, he would be reassigned by ASIS to other available work for which he was qualified. After these meetings, Larson received no further complaints about Harry Hawkins. (Larson Tr. 1452-1453, 1458).

After complainant's departure from the PITBUS, Carver received phone calls from Gary Hale, Brian Stickler and Kirk Hastain stating that Harry Hawkins was a great guy and expressing their concern that he would be fired because complainant had left the job. According to Carver, Stickler stated that, if a decision was made to fire Harry, he would have Alyeska deal with it. Carver's interpretation of these contacts was "don't mess with Harry." (Carver Pl. Ex. 71 at 4-5). Stickler testified that he was concerned that Hawkins was about to be fired, and that he told Carver he should carefully consider it, because Harry had done a good job and it would be difficult to find a replacement as competent. (Stickler Tr. 2131). Stickler denied using Alyeska as a threat. (Stickler Tr. 2187-2187).

9. Change of certification requirements for the UT crew.

As discussed above, from June 13, 1994 to June 19, 1994, Harry Hawkins worked together on the PITBUS with Bud Hawkins, who was also a full Level II technician. Brian Stickler, the site engineer assigned to the PITBUS that week, observed that having two experienced Level IIs work together on the PITBUS resulted in increased productivity. The two Level IIs were able to fix the equipment problems, which were common at first (B. Hawkins Pl. Ex. 124 at 181), and do their inspections better. As Harry Hawkins testified,

You had two technicians that could basically rest each other, instead of one person scanning until he couldn't hold his arm up. Doing manual scanning, the other guy could take over. You were just like two independent entities. And you could just, basically -- you know, you didn't have to rely on the other person to do all the work."

Pl. Ex. 125 at 86.

Stickler told Gary Hale, the VECO field engineer responsible for the PITBUS operation, that, in his opinion, the PITBUS should be regularly staffed with two Level II ASIS NDE technicians. (Miller Tr. 2329-2330; Stickler Tr. 2094-2095, 2110-2111, 2122-2125, 2188-2189, 2192-2195, 2198-2199; VECO Ex. 89.)

The rationale for this change was as follows. With continued Level II/Level I staffing, the PITBUS operation would have to close down for the day if the Level II were injured or ill or unable to work for any reason, because a Level I NDE technician cannot perform UT testing without direct supervision by a Level II. Similarly, the PITBUS would have to shut down during lunch breaks or if one of the Level II technicians were called away for a telephone call or some other reason, e.g. to handle other priority projects such as shear wave testing on pipeline flanges or spot work at the site of a Mainline Dig. (The Mainline Digs involved excavating pipeline underground for UT inspection.) Thus, for example, when complainant left the PITBUS without notice, the PITBUS was able to continue operations because Harry Hawkins was a Level II. (Stickler Tr. 2124-2125, 2153; Pl. Ex. 72 at 3). In short, if the PITBUS were staffed with two Level II technicians, it could continue to operate if one was absent because Level II technicians are qualified to work independently. (Stickler Tr. 2124-2125, 2203-2204; Engblom Tr. 1096, 1113-1114; Hale Pl. Ex. 62 at 1; Carver Tr. 916-917).

Stickler had no specific data that showed an increase in the number of grids scanned. (Stickler Tr. 2188-2189). At some point, however, apparently after making the decision to change the technician certification requirements, Hale pulled the data on grid production, and found an increase in 40% when two Level IIs were paired, based on data from the one day the equipment was running properly. (Hastain Tr. 1325; Stickler statement Pl. Ex. 63 at 2; Pl. Ex. 94 at 3; Tyner Tr. 2472-2473).

Stickler testified that, in his experience, the PITBUS had never shut down because a Level II technician was sick. (Stickler Tr. 2203). Shawn Zuke, a Level II-T technician, also testified that she had never seen anyone sick on the job, and that she had only seen one flange inspection performed during her time on the PITBUS crew. She acknowledged, however, that because she was a Level II-T, she was qualified to continue running the automated scanner system without supervision while the Level II went to lunch if the operation was behind on the number of grids scanned. She also acknowledged that she occasionally performed manual UT testing by herself "so the [Level II] could take a break and go use the telephone or go to the bathroom." (Zuke Tr. 1009-1012). On cross examination, Zuke agreed that there was more flexibility in performing the PITBUS work if the staffing pattern was one Level II technician and a second technician certified at least at the II-T Level. (Zuke Tr. 1034-1036; see also Hale Pl. Ex. 62 at 2).

Alyeska launched a costly flange testing program in 1994. The program had startup problems associated with development of a calibration standard and an approved procedure. (B. Hawkins Pl. Ex. 124 at 113; Engblom Tr. 1092-1095, 1098-1099; Hastain Tr. 1237-1238). Zuke testified that, in June, 1994, it was expected that there would be flange testing during the summer and fall because “they would work out the bugs and get it going.” The program was later canceled “because they never got the bugs worked out” and Alyeska was not satisfied with the results. (Zuke Tr. 1030-1031; Engblom Tr. 1094-1095; Stickler Tr. 2116-2117, 2201-2202). The evidence shows that the PITBUS crew performed four flange tests on September 9, 1995 at Pump Station 6; eight tests on June 7, 1994 and two on January 19, 1995 at Pump Station 8; and two tests on January 15, 1995 Pump Station 10. (Engblom Tr. 1165-1170; Pl. Ex. 121, 122). Some flange tests were also performed in 1996. (Stickler Tr. 2201).

On June 28, 1994, VECO's Hale telephoned Alyeska's Hastain and proposed a change in the certification levels of the UT technicians on the PITBUS to require both of them to be a Level II. (Hastain Tr. 1232-1237, 1283; Pl. Ex. 72 at 1). Hale was required to coordinate this change with Hastain. (Hastain Tr. 1265). Stickler understood that Hale's proposal was, at least in part, an outgrowth of his observations on the productivity improvements during the June 13-19, 1994 period when the PITBUS was staffed with two Level IIs, i.e., Harry Hawkins and Bud Hawkins. (Stickler Tr. 2131-2133).

Stickler testified that he was motivated only by improving the program, and had no desire to affect anyone's livelihood or job position. He felt that folks such as Richard Sipes and Shawn Zuke would have to improve their credentials to a Level II, or put in some more time on the Mainline digs, where there were Level I positions available. He did not expect people to lose their jobs. (Stickler Tr. 2133-2134, 2155).

Hastain felt that Hale's proposal was justified, since the cost increase was small, i.e., the difference in hourly rates between Level Is and Level IIs, while the potential increased productivity was great considering the high hourly cost of the entire PITBUS operation. (Hastain Tr. 1232-1240, 1257-1260, 1269; Aly. Ex. 253 at 0820). He felt that, since a Level I could not operate without the direct supervision of a Level II, any failure to have a Level II technician available would stop the collection of manual or automated UT data. (Hastain Tr. 1232-1240, 1257-1260; Pl. Ex. 72 at 3). Hastain was aware that the change in required certification Levels would make Complainant and Zuke ineligible for further work on the PITBUS, but believed that ASIS had ample other work for which they were qualified, on such projects as the Mainline Digs. (Hastain Tr. 1239-1340).

Hale also discussed his proposal with Alyeska Corporate Level III Engblom. (Engblom Tr. 1111-1112). Engblom approved of the change because it would give the ASIS NDE technicians greater flexibility in how they performed the work, thus leading to greater efficiency and productivity. (Engblom Tr. 1111-1114). Engblom cautioned Hale that it was not the best time to implement an upgrade in the crew certification Levels for the PITBUS, however, because complainant had raised concerns. (Engblom Tr. 1112-1114, 1151).

On June 28, 1994, Hale requested approval of the change in certification Levels of the PITBUS UT crew from ASIS general manager Billy Carver. (Carver Tr. 825-831, 927-935).

Carver also expressed concern about the political ramifications of such a change because both complainant and Shawn Zuke would lose their employment on the PITBUS crew. He asked that the request be put in writing. On June 29, 1994, at 5:54 p.m., Hale sent Carver a PROFs message confirming the request. He stated that implementation could occur “as soon as is convenient for you without incurring any extra expenses. It would be most convenient if the changeover could occur on normal shift-change schedules.” (Aly. Ex. 57; VECO Ex. 7; Carver Tr. 827-829, 835-836).

Carver acquiesced in Hale’s request because he believed that it would simply reinstate the original work order for the PITBUS which required two Level II UT technicians. He concluded, after consulting with ASIS Corporate Level III Jim Schaeffer and ASIS Quality Control Manager Sham Mehta, that Hale's request was reasonable. (Carver Tr. 827-829, 844, 930-933). Carver testified that he had the discretion to determine whether and when to implement the change, but “when you’re a service organization supplying a service to another company, you try to provide good service and part of that good service is being responsive with the work and the requests that come to you” (Carver Tr. 844).

In his interview statement, Richard Lawson, the author of the PITBUS work order, stated that he had discussed with Kirk Hastain his concern that Hale did not want to use Level Is because these particular Level Is were “raising hell.” (Pl. Ex. 64⁴). Hastain had no recollection that Lawson had raised such a concern. (Hastain Tr. 1290-1297). Lawson indicated that he had only minimum involvement with the PITBUS program because it involved ultrasonic testing, and such technical issues were handled by ASIS personnel. Nevertheless, Lawson believed that it was a good decision to have two fully qualified Level IIs in the field, because “[i]t takes a Level 2 to do the NDE of the flanges, its [sic] not a simple function and takes a very experienced person.” He was “miffed,” however, that Gary Hale had contacted ASIS general manager Billy Carver directly to make the change. (Hastain Tr. 1287, 1288, 1291-1292).

On June 29, 1994 at 6:03 p.m., Carver sent a PROFS to ASIS Supervisor Don Erickson forwarding a copy of Hale's request with instructions to "implement this new staffing requirement as soon as practical with as little impact on the crew as possible." (VECO Ex. 7; Carver Tr. 839-840; Erickson Tr. 2259-2263). Carver also requested Erickson to "make every effort to reassign Shawn Zuke and Richard Sipes to other work as soon as possible to minimize the impact of these changes to them." (VECO Ex. 7; Carver Tr. 913-914).

On June 29, 1994 at 6:15 p.m., Erickson telephoned complainant at home and advised him that he could not continue to work on the PITBUS because the crew certification level had been changed to Level II. He assured complainant that he was on the top of the list for the next available job for a Level I UT technician, which would be at one of the Mainline Digs. (Erickson Tr. 2263-2267; Aly. Ex. 58; ASIS Ex. 21). ASIS General Manager Carver also assured complainant that he would be assigned to a Mainline Dig crew as quickly as possible. (Carver Tr. 914; Aly. Ex. 72 at 03683).

⁴ Alyeska has waived its hearsay evidentiary objection to the admission of the Lawson interview statement as Pl. Ex. 64. (Post-Hearing Reply Brief of Respondent Alyeska at 22).

On June 30, 1994, Erickson responded to Carver's June 29 PROFS. (VECO Ex. 7). He stated that the UT technicians presently on the PITBUS were Bud Hawkins, Level II and Sean Larson, Level II-T, who were due to go off their shift on July 18, 1994. He planned to hire Harold Beard, a UT Level II, to work with Harry Hawkins for the shift beginning July 18 and ending August 8, 1994. Sean Larson would finish out the shift ending on July 18 and take the UT Level II test before his next shift. Erickson would need another UT Level II for the PITBUS starting August 8, 1994, however, if Larson did not pass the test or have the required number of on-the-job-training hours. (Erickson Tr. 2263; Pl. Ex. 84).

Shawn Zukes was placed on layoff in on-call status effective June 14, 1994. Complainant was placed on layoff in on-call status effective June 28, 1994. (ASIS Ex. 21.) The layoff was dated as of the last day they each worked. (Erickson Tr. 2267). Sean Larson completed the three-week shift ending July 18, 1994. (Erickson Tr. 2298-2299; Pl. Ex. 84).

10. Complainant's complaint to the Alyeska Ombudsman and the subsequent investigation.

In 1994 Alyeska had an Ombudsman Program. Pl. Ex. 32 at 7; Aly. Ex. 64. The program was created to give Alyeska and Alyeska contractor personnel a vehicle for reporting matters of concern arising under the Alyeska Code of Conduct, either anonymously or under special confidentiality agreements established by the employee and the Ombudsman. (Pl. Ex. 32 at 7; Tyner Tr. 2457-2458). The Alyeska Code of Conduct is incorporated in all Alyeska contracts. Its purpose is to encourage Alyeska employees and employees of its contractors to raise issues that relate to the operation of the pipeline without fear of retaliation. (Pl. Ex. 32 at 4-9; Dayton Tr. 1200-1201).

After his June 28, 1994 lay off, complainant complained to Larry Wood, the Alyeska Ombudsman, about the collection of UT corrosion data at Pump Station 10, harassment by his co-worker, Harry Hawkins, and possible retaliation for complaining about these matters. (R. Sipes Tr. 494-495; Aly. Ex. 64; Tyner Tr. 2403). Ombudsman Wood then obtained complainant's permission to discuss his concerns with Alyeska management in order to begin an investigation of his allegations. (Aly. Ex. 64; Tyner Tr. 2403-2404). On July 14, 1994, Wood held a meeting with Brett Tyner, who was manager of Alyeska's Quality Services Department and administrator of the contract between Alyeska and ASIS; Mike Engblom, Alyeska's Corporate NDE Level III specialist; Kirk Hastain; and Bill Steele, Hastain's superior, who was in charge of Alyeska's corrosion engineering program. (Aly. Ex. 64; Tyner Tr. 2404-2406). Wood asked Brett Tyner to coordinate the investigation. (Tyner Tr. 2404).

By July 21, 1994, Tyner had prepared an action plan for the investigation, and had established an investigation team which included himself, ASIS Human Resources Manager LoAnn Larson, and an Alyeska human resources contractor/consultant, Lisa O'Brien. VECO was not included. (Aly. Ex. 65; Tyner Tr. 240-2408; Larson Tr. 1459-1462). Tyner had also secured a report from LoAnn Larson on how ASIS had handled the situation up to that time. (Aly. Ex. 72; Tyner Tr. 2411; Larson Tr. 1455-1458).

Tyner also contacted the Joint Pipeline Office (JPO) because of the concerns raised about the integrity of the pipeline. (Tyner Tr. 2409; Aly. Ex. 69). The JPO is a group of government agencies with regulatory jurisdiction over the pipeline. It includes State of Alaska agencies, the Federal Bureau of Land Management, and the Office of Pipeline Safety of the United States Department of Transportation ("DOT"). (Dayton Tr. 1179-1181; Tyner Tr. 2409-2410). Thereafter, Peter Katchmar, of the DOT Office of Pipeline Safety, participated in the investigation team's work. His primary concern was the safety and integrity of the pipeline. (Tyner Tr. 2409, 2411-2412; Larson Tr. 1459-1460, 1463-1464).

The team planned to investigate the issues of: (1) harassment, intimidation and retaliation involving the complainant, which Tyner described as personnel-oriented, and (2) falsification of UT readings, which he described as involving technical concerns. (Larson Tr. 1461; Tyner Tr. 2411-2414). ASIS's LoAnn Larson took primary responsibility for the personnel issues. (Larson Tr. 1461-1462). Alyeska's Tyner took primary responsibility for the technical concerns. (Larson Tr. 1461-1462; Aly. Ex. 90; Tyner Tr. 2413 -2416).

Between July 26, 1994 and August 4, 1994, the joint investigation team (including, frequently, DOT's Katchmar) interviewed eleven ASIS employees, one VECO employee, one CORRPRO employee and three Alyeska employees believed to have knowledge of the issues raised by complainant with the Alyeska Ombudsman. (Tyner Tr. 2411-2413; Larson Tr. 1462-1468; ASIS Ex. 6). Each of the joint investigation team members asked questions during the interviews, and notes were taken and transcribed for each interview and provided to the interviewees for their review and correction. (Larson Tr. 1464-1468; ASIS Ex. 6; Tyner Tr. 2412-2413).

On July 24, 1994, Tyner convened a meeting to discuss how to investigate the technical concerns, i.e. the UT problems at Pump Station 10. The following persons attended: Kirk Hastain and his supervisor, Bill Steele, of Alyeska; Sham Mehta, quality assurance director and Jim Schaeffer, Corporate Level III, of ASIS; Bob Krenzelok, Joe Correa and Don Keyes of the JPO; Peter Katchmar, of the DOT Office of Pipeline Safety; Jim Whedbee, a Level II UT specialist, a Stone & Webster employee providing services to the JPO; and Bill McKnight, a Level III UT specialist and employee of Raytheon, who was providing services to Alyeska. An audit team was designated, including Whedbee and McKnight; Hastain as the Alyeska coordinator, because he had been actively involved on the engineering aspects of the PITBUS; Schaeffer, for technical and equipment support; and Bob Krenzelok as the JPO coordinator.

Kirk Hastain believed that it would be difficult to determine if there had been falsification of data, because, "due to the inherent variations in manual UT system (equipment and operator) in a production type setting, anything abnormal will be difficult to detect, unless grossly in error." (Pl. Ex. 72 at 5). Brian Stickler also believed that it would not be obvious if Harry Hawkins had, in fact, entered the previous year's data. Stickler testified that, in reviewing current inspection data in comparison with prior year's data to determine if errors had been made and reinspection was necessary, he would not necessarily reinspect where the 1994 readings of wall thickness showed little or no reduction from the 1993 data or even seemed to indicate that

the wall was getting thicker, because one of the sets of readings could have been "off." (Stickler, Tr. 2172-2174, 2211). The initial plan was to perform sample retesting for corrosion at Pump Station 10 only. (Aly. Ex. 90; Tyner Tr. 2413-2418, 2462-2463, Hastain Tr. 1297, 1300-1307; Pl. Ex. 72).

After consultation with complainant on August 10, 1994, to confirm appropriate locations for retesting, Whedbee and McKnight performed the work on August 13, 1994, in the presence of complainant and ASIS Human Resources Manager Larson. (Larson Tr. 1469-1485; R. Sipes Tr. 423-425, 628-629; ASIS Ex. 15 at 0052-0056; ASIS Ex. 24). They rescanned 50 of 333 grid points at the location specified by the complainant, without reference to thicknesses recorded from previous measurements. (Tyner Tr. 2488-2489; Pl. Ex. 47 at 2).

On August 18, 1994, Whedbee and McKnight issued a report, "PUMP STATION 10 - UT CONTENTIONS," summarizing their conclusions. (Pl. Ex. 47; Tyner Tr. 2418-2419).

Complainant's primary contention (Contention #1) was (a) grids had been scanned too quickly, allowing only 20 seconds per grid point, or had not been scanned at all; and (b) there was falsification of data, because, when the UT technicians could not find the lowest thickness, or did no scanning, they manually input the lowest reading from the previous examination minus a couple of mils. Whedbee and McKnight concluded that there was no evidence to support complainant's contention, because the sample data collected during the retesting correlated well to the data recorded by Harry Hawkins in May 1994. No conclusion was reached on the allegation that Harry Hawkins had scanned too fast. It was noted that, based on a review of the 1994 data, the scanning speed per grid point was 18.1 seconds. Whedbee and McKnight recommended that Alyeska seek to establish a standard scanning speed based on the repeatability and accuracy of the desired results. (Pl. Ex. 47 at 2-3).

Kirk Hastain testified that, if a technician had falsely entered the prior year's data, the method used by Whedbee and McKnight would not have revealed falsification unless significant corrosion had occurred during the year. The audit did show, however, that, if there had been any input of false data, it had not masked significant corrosion or pitting in the grids retested. (Hastain Tr. 1317, 1322-1323). Bud Hawkins testified that, unless significant corrosion had occurred between 1993 and 1994, if a competent technician had done the readings in 1993, those readings might well still be correct in 1994, in the absence of significant corrosion. (B. Hawkins Pl. Ex. 124 at 73).

With respect to Contention #2, not extending grids when corrosion was noted at the edge of the original grid, it was concluded that there was no violation, because the Corrosion Field Engineer had final approval of all grid locations and sizes. Whedbee and McKnight did recommend a change in procedures and a determination of whether grids S-5 and D-43 should be extended. (Pl. Ex. 47 at 4-6).

With respect to Contention #3, acceptance of bogus readings by the Corrosion Field Engineer, complainant indicated that the automated ultrasonic equipment was out of calibration because it was reading 20 mils less than the actual wall thickness and that the paint thickness was

misrepresented as 16 mils when it should have been between 8 to 10 mils. Whedbee and McKnight found no evidence that the equipment had malfunctioned, based on their review of calibration records. They did find the contention supported, however, because the new data, which was collected manually, averaged 20 mils thicker than the data previously collected for that same area by automated equipment. They determined that this was due to a calculation error by the Corrosion Field Engineer and recommended that consideration be given to re-examination of all automated examination locations, and all ultrasonic data collected through paint. (Pl. Ex. 47 at 7-9).

With respect to Contention #4, allowing Level I technician to take readings without Level II supervision, it was noted that the duration had not been more than 15 minutes, that the calibrations were confirmed, that complainant had a high degree of confidence in the accuracy of the data he collected when left without direct supervision, and that, although this may have been the general practice, the procedural requirements did not expressly prohibit Level Is from conducting and recording UT thickness data. Whedbee and McKnight recommended that ASIS communicate proper procedure requirements to the individuals or revise their procedures specifically to prohibit the practice if they did not wish to utilize Level I personnel without direct supervision. (Pl. Ex. 47 at 10-11).

With respect to Contention #5, under calibrating of manual UT equipment, complainant indicated that this took place only on manual UT inspections, and that the instrument was undercalibrated by 0.002", so that readings of 0.248", 0.498" and 0.748" were input in lieu of the actual measurements of 0.250", 0.500" and 0.750". Whedbee and McKnight concluded that this contention could not be confirmed "due to the repeatability of the ultrasonic thickness measurement process." In addition, since the manufacturers' equipment tolerance is ± 0.005 ", an undercalibration of 0.002" could not be verified. (Pl. Ex. 47 at 12).

With respect to Contention #6, not extending grids around bottom of piping that was physically rotated, a field visit showed that a spool piece had in fact been rotated at pump station 10. Whedbee and McKnight concluded that the procedures do not address this issue except to the extent that the responsibility for grid dimensions resides with the Corrosion Field Engineer. They recommended that Alyeska review the specifications to determine if a revision was necessary to provide instructions on grid extensions when a pipe spool was rotated, and that Alyeska should determine if the grid should be extended where the spool piece had been rotated. (Pl. Ex. 47 at 13).

With respect to the personnel issues, the joint investigation team concluded that Gary Hale and Richard Hastain knew that complainant and Shawn Zuke had made allegations about the operations of the PITBUS, and that Hale and Hastain also knew that the upgrade in staffing of the PITBUS crew would result in the removal of both complainant and Zuke. They concluded that the timing of the upgrade was questionable, given its impact on complainant and Zuke. They concluded, however, that there was a legitimate business basis for the decision, i.e. productivity, because, with two Level II UT technicians, the PITBUS could continue to operate when one of the UT technicians was sick, and all PITBUS technicians could perform flange testing. Such a change in crew requirements would offset the risk of downtime and the cost

associated with the risk, resulting in an increase in flexibility. Whether the PITBUS had actually shut down because a technician had become sick or whether flange testing was actually performed was not investigated. (Tyner Tr. 2478-2482). ___

The joint investigation team issued its final report summarizing its findings on February 3, 1995. The report was entitled: "Pump Station 10 Ultrasonic Testing Quality Concern -- Summary Report." (ASIS Ex. 5 at 0316-0366; Pl. Ex. 74; Tyner Tr. 2425-2427; Larson Tr. 1412-1414). With respect to human resources related issues, the joint investigation team reached the following conclusion:

While it was difficult to conclusively validate the allegations of intimidation, the accused individual's [Harry Hawkins'] style was not found to be intimidating to superiors or to peers. There was, however, enough substantial examples to assume it was possible that the individual's style could be felt to be intimidating of those who were subordinate to him.

It was determined that the decision to upgrade crew qualifications was not a retaliatory action. It was thought to be made by the decision makers in the best interests of APSC. Although the basis of the decision was determined to be appropriate, the timing of the decision under the circumstances was questionable. Additionally, the level of specific direction provided by the decision makers appeared to over-constrain ASIS's ability to appropriately staff assignments.

(ASIS Ex. 5 at 0318; Tyner Tr. 2476-2485).

11. Second change of certification requirements for the UT crew

Based on the interviews performed during the investigation, Alyeska's Tyner decided that the staffing changes to the PITBUS crew to require two Level IIs per shift were hampering the ability of ASIS to perform its contractual obligations. On August 15, 1994, Tyner, with the concurrence of Kirk Hastain, issued a letter to ASIS (Pl. Ex. 32) which removed any restrictions, and authorized ASIS to staff the PITBUS with UT technicians as it saw fit, consistent with "its expertise in the field of nondestructive examination and its familiarity with the assignment, to optimize the value of service it is providing to Alyeska." (Tyner Tr. 2420-2422; Hastain Tr. 1242-1245; Carver Tr. 860-863, 937-938). Tyner denied that this letter reflected a conclusion that the prior staffing change on the PITBUS was a bad business decision. (Tyner Tr. 2446-2447).

On August 24, 1994, ASIS General Manager Carver readjusted the technician certification requirements for UT technicians working on the PITBUS to pair a Level II with a Level II-T UT technician on each shift. Carver did not feel that a return to staffing the PITBUS with a Level II technician and Level I technician was appropriate. A Level II-T was authorized to perform thickness readings without a Level II there to supervise, thus allowing the Level II to perform shear wave inspections on the flanges. A Level I could not take readings independently, however. Carver felt that readjusting the certification requirements to pair a Level II technician with a Level II-T technician allowed him to keep as many people working as possible, while still meeting the concerns of Gary Hale, Jim Schaeffer and Sham Medha about productivity, and complying with the procedures requiring oversight of a Level I by a Level II.

Carver advised Tyner, Hammond, Erickson, Sham Mehta, LoAnn Larson, Kirk Hastain, and Schaeffer of his decision. He also informed them that he was planning to provide all ASIS NDE technicians the opportunity to receive training and time on the job in shear wave testing to become eligible to test to full UT Level II certification. (ASIS Ex. 5 at 0367; Carver Tr. 860-863, 868-869, 937-938). He assigned Shawn Zuke, a Level II-T technician, to work with Bud Hawkins, a Level II, and Sean Larson, a Level II-T technician, to work with Harry Hawkins, a Level II.

12. The PITBUS closure meeting of September 19, 1994.

The joint investigation team of Tyner, Larson and O'Brien held a "PITBUS closure meeting" on September 19, 1994 at the Prudhoe Bay facilities. (Tyner Tr. 2422-2423; Larson Tr. 1510; ASIS Ex. 40). The meeting also included complainant, Harry Hawkins and Bud Hawkins, Sean Larson and Shawn Zuke, engineers Hale, Stickler, Erickson and Grippin and ASIS General Manager Billy Carver. (Larson Tr. 1504-1505, 1533-1535; ASIS Ex. 40.) The purpose of the meeting was to bring together the individuals who had been a part of the investigation, to explain the outcome of the investigation, and to work to put the issue behind them. (Tyner Tr. 2422-2425; Larson Tr. 1504-1505; ASIS Exs. 37, 40, 41; Zuke Tr. 1022).

In addition to the group meeting, ASIS Human Resources Manager Larson and Alyeska contractor Lisa O'Brien held one-on-one coaching and counseling sessions lasting approximately 30 minutes each with complainant, Shawn Zukes, Bud Hawkins and Harry Hawkins. Larson also gave some feedback on her own to Billy Carver and Jim Schaeffer. (Larson Tr. 1504-1505, 1508-1509, 1510-1528, 1532; ASIS Ex. 41). Larson testified that, during the one-on-one session with Harry Hawkins, he was given positive feedback for his hard work ethic, for holding his own in the June 6 meeting when he was criticized, and for getting along well with the site engineers. (Larson Tr. 1525-1526.) He was also told that he needed to have more tolerance for other people's style of working, and to be aware that his style appeared to be harsh and intimidating to lower level people. (Larson Tr. 1526-1528.)

13. Complainant's Work on the Mainline Digs

Complainant was recalled by ASIS to work as a Level I UT technician on the Mainline Digs commencing August 23, 1994. (R. Sipes Tr. 498; Aly. Exs. 123, 124, 126; ASIS Ex. 28; Aly. Ex. 4 at 00055, 00058, 00062; Larson Tr. 1488-1491, 1552-1554; Carver Tr. 870; ASIS Ex. 48). While working with complainant at Pump Station 8, Bud Hawkins became sufficiently concerned about his behavior to contact Hammond and Erickson, who in turn contacted LoAnn Larson. Hawkins testified that complainant had had a personality change. He stared into space, seemed lethargic, was not focused on the work, was unable to accurately label a grid with the alphabet, had a couple of close calls while they were driving, and his performance was "less than adequate." Complainant admitted to Hawkins that he was on medication. (ASIS Ex. 34; B. Hawkins Pl. Ex. 124 at 74-76, 118).

Complainant testified that, during the period from late August 1994 to October 1994, while working on the Mainline Digs, he was "stressed" and not thinking clearly. (R. Sipes Tr. 513-514). He also testified:

Well, at that time [September 25, 1994] I was a confused person. I really didn't know what was going on. (R. Sipes Tr. 966).

I wasn't thinking of reality, you know. That's exactly what it was. (R. Sipes Tr. 516).

Actually the only thing I recall is I wasn't feeling too good out there. I was doing all kinds of weird things. (R. Sipes Tr. 506-507).

I was probably a scared individual out there under duress. I was in fear of receiving more retaliation. (R. Sipes Tr. 508).

I was having health problems out in the field, from receiving continuous harassment and retaliation. (R. Sipes Tr. 691).

That medical condition I was in, my health reasons and everything else. I don't know all the aspects was, is that the only thing I knew is that hey, that we had those meetings I wasn't supposed to lose my job on the PITBUS. (R. Sipes Tr 690-691).

Between August 26, 1994 and September 27, 1994, Complainant telephoned ASIS Human Resources Manager LoAnn Larson frequently and sent her several PROFs, set forth below verbatim in pertinent part:

8/26/94 Subject: lesson

ASIS Ex. 30 hi, Loarann how are you.
I was wandering if the company is looking for assistant. manager yet. if so I would appreciate you would let me know I would be gladly to apoly for the postion.
thank you
Richard

9/1/94 Subject: concerns

ASIS Ex. 31 my biggest concern is to get along with my own life and be a team player. Maybe someday everbody will get along and work together and maybe I will take you up on one of your offers.
thanks

9/4/94 Subject: I would like to change careers

ASIS Ex. 32 i
maybe, some day I will learn the respect of the company and what I did was right as a quality control inspector report what i heard and seen and what they on the pit bus did to me. We should of handle the matter in a professioal way instead of the the way that cost a lot of us hardship, everybody in the pitbus meeting did wrong except me I have learned a great deal of a lot of
bs that rose out of the meeting with alyeska and us/dot,
and it is wrong as a quality control inspector to get somebodysle fired for thier wrong doingbut try to improve thier work ethics to a quality way and not letthisnthappen again what happened to me working on the alyeska pipeline. The word quality lays in the person and how they applied in ther workman ship. I am a true believer in quality, what people think i did wrong but they never stopped and lesson to the truth maybe they are the one in the wrong and not me as they believe. maybe i might

be a team player again on the Alyeska pipeline but I would like to change my career and be a better team player.

see ya
Richard

Pl. Ex 19 at 4.
9/11/94 hi Lo

Subject: goals

I would like to be in the Human Relations, there are many things I got to learn one is better communication skills and knowing more about human behavior and I would like you to learn me these skills NDE is the way to fall back on and it isn't my life. My life is to start my own family and being home every night to watch my quality issues grow. Quality issues in Latin means children, and my other quality issue is to watch things grow in safety, management, environment and this issue in Greek means business communications. I would like to be present when you and Billy have the Pit bus meeting on 9-19-94 and share the quality concerns of ASIS management team and maybe someday I would be part of the team. Last concern is that I have no hate feelings towards anybody or anything that has value.

There is a supervisor opening on my profs is this fact or friction.

see ya
Dick Sipes

ASIS Ex. 46
9/25/94 Hi, Lorann

Subject: no more wrong decision

The ASIS organization wants me to take the manager or the GENERAL manager position. I will accept the position under these conditions number 1, I believe in QUALITY

- 2, enhance teamwork (FAMILY)(ASIS)
- 3, set long term goals
- 4, comprise (CLIENTS) (EMPLOYEES)
- 5, QUALITY LEADERSHIP
- 6, caring
- 7, IMPROVED problem resolution committee
- 8, I HAVE VALUE

I made a wrong decision by coming to Valdez to work the digs I am not a yes sir person or a chief I am just Richard a kind young man very relaxed, caring and full of wisdom and I would make this quality inspection company the biggest in Alaska. My goals in life is to be part of the ASIS management team, and not be field ut. hand. If this QUALITY COMPANY still wants me to be on the management team it would make very happy. Some people think I am butt kisser for wanting a position on the management team, but I think I have earned that position, aslo [?] I have higher goals in life than most people. I am very sorry for calling you so much and I don't know why, because you are king and a go getter, you don't take any crap from anybody. I GUESS

'E a lot grab from people but I don't let it bother me anymore, looking forward not backwards anymore. I checked my profs there is two openings instead of my my interest still lays in the anchorage office, was Billy planning to work in Fairbanks or Anchorage? I feel like a heel for coming down here in Valdez and when I got here I still felt like I should have turnaround and come back to Anchorage. if the company can assure me a position as a team player on the ASIS management team I would leave Valdez in hot minute and give Brent Tyner

a call and tell him no more digs.
Thank you Lorann for reading this unclear letter.
author thing RUSTY has to call anchorage to see if i can get per diem
i must be personal can mean any type of position in anchorage is that
correct, then who him i?
THANKS
RICHARD

ASIS Ex. 47 Subject: How to move forward
9/27/94 Hi, Lorann
Problem Resolution Procedure
Nobody needs the JPO hotline, just go to the source.

quality
Richard.

Larson credibly testified that she was confused by these communications because, inter alia, she has never gone by or been referred to as “Lo” or “Lorann,” there is no job at ASIS called assistant manager, the job of general manager was not open and she had not discussed the position with complainant, no positions in human relations were available, she had never made a job offer to complainant, and she did not know what he meant by many of the things he said, including such phrases as “quality issues in Latin means children.” (Larson Tr. 1490-1495, 1501-1503, 1549-1552). R. Sipes Tr. 506-508, 509-510, 511-514; Pl. Ex. 19; ASIS Exs. 30, 31, 32, 34, 37, 38, 39, 46, 47).

Complainant alleges that, while working on the Mainline Digs project in August or September 1994, Robert Dullanty, whom he believed worked for VECO, verbally harassed him. (R. Sipes Tr. 503-508). According to complainant, Dullanty told him “I thought we got rid of your butt, Sipes” and said he had just finished taking two weeks of psychiatry training “just to handle [his] butt.” Complainant also testified that Dullanty had told ASIS NDE technicians Sean Larson and Bud Hawkins to “get rid of [his] butt” if either of them saw him “punch any wrong data.” (R. Sipes Tr. 503-508).

Dullanty, an engineer for PN&D, a VECO subcontractor, denied making any of the statements attributed to him or knowing that Complainant had raised any matter of concern. (Dullanty Tr. 2369-2382, 2388-2389). Complainant’s allegations in regard to Dullanty were not corroborated. Bud Hawkins did not mention any such harassment of complainant by Dullanty during his testimony, although, according to complainant, he had witnessed the harassment. (B. Hawkins Pl. Ex. 124 at 74-76; R. Sipes Tr. 506-507)

On September 27, 1994, complainant telephoned ASIS Human Resources Manager Larson from Valdez, Alaska and asked if he could return home to Kenai, Alaska because the Mainline Digs work was “slow” and he was not feeling well. (Larson Tr. 1552-1554; ASIS Ex. 7 at 0571. Larson, out of concern for his well being, encouraged him to do so. (Larson Tr. 1553).

On September 30, 1994, ASIS Supervisor Erickson telephoned complainant at home in Kenai and informed him that, because the Mainline Digs project was ending for the year, he would no longer be working on that project. (Erickson Tr. 2271-2274; ASIS Exs. 48, 89; Carver

Tr. 870-871). Erickson told Complainant to contact LoAnn Larson. At the time, Larson was on vacation until October 10, 1994. (Erickson Tr. 2271-2274; ASIS Ex. 48; Larson Tr. 1559).

Beginning September 28, 1994, complainant left a series of angry voice mail messages on ASIS Human Resources Manager Larson's office phone, while she was away on vacation, complaining that he had not been promoted to the position of ASIS General Manager (which was Carver's position at the time) or a position in the ASIS Human Resources Department. Among other things, he accused Larson of destroying his life, and said that he was "really pissed off." (Larson Tr. 1555-1559, 1572-1574; ASIS Ex. 7 at 0569-A, 0570, 0568-69, 056-A; ASIS Ex. 84).

14. Complainant's Layoff on October 14, 1994

On October 14, 1994, when the Mainline Digs project was coming to an end for the season, ASIS laid off complainant. LoAnn Larson met with him to process his layoff. (ASIS Exs. 50, 51, 89; Larson Tr. 1559-1563; Carver Tr. 870-873; Hammond Tr. 2034-2035; Erickson Tr. 2272-2273). Because of concerns about complainant's behavior, she advised him that he would have to provide a medical release before returning to active status with ASIS. (ASIS Ex. 50; Larson Tr. 1560-1562). She described complainant as cooperative during their meeting, and worked with him to develop a description of his job responsibilities to obtain the physician's release. (Larson Tr. 1560-1563).

Complainant was one of thirty-two ASIS employees placed in layoff status by ASIS between July 1, 1994 and December 31, 1994. (ASIS Ex. 77; Larson Tr. 1588-1589). He stated on his claim for unemployment insurance that his layoff was due to lack of work. (ASIS Ex. 3 at 0279; Larson Tr. 1408-1412). Neither Alyeska nor VECO participated in or had knowledge of the decisionmaking process that led up to complainant's layoff by ASIS on October 14, 1994. (Larson Tr. 1598-1599; Tyner Tr. 2427-2429; Aly. Ex. 165). Alyeska first became aware that ASIS had laid off complainant when LoAnn Larson so advised Alyeska's Brett Tyner on October 17, 1994. (Tyner Tr. 2428, Aly. Ex. 165).

15. Post-Layoff Events.

After learning that ASIS General Manager Carver had planned a business trip to Kenai, complainant's hometown, complainant telephoned Carver and threatened him, saying that if he were Carver, he would not go to Kenai. (ASIS Ex. 9; Aly. Ex. 245; Carver Tr. 873-880, 921-923; Larson Tr. 1563-1564, 1566-1567; ASIS 55; R. Sipes Tr. 967-968).

Complainant repeatedly telephoned Alyeska's Tyner between October 18, 1994 and October 21, 1994, venting his anger at ASIS because they had, inter alia "brainwashed" him and "played with [his] mind," and claiming to have a videotape of Harry Hawkins performing acts that he felt were inappropriate. (Tyner Tr. 2429-2436; Aly. Exs. 162, 168, 170, 176). Complainant refused to provide a copy of the videotape to ASIS or Alyeska. (Tyner Tr. 2431-2432).

Complainant also made numerous complaining telephone calls to members of ASIS management, particularly Human Resources Manager LoAnn Larson. (ASIS Exs. 8, 58, 59, 84; Aly. Ex. 246; Larson Tr. 1569-1570, 1573-1579, 1589). He often left telephone voicemail messages for Larson on her office telephone very late at night. These messages were rambling, disjointed, and personal. Complainant once called her house at 9:30 at night, upsetting her and her husband. (ASIS Ex. 8; Aly. Ex. 246). Complainant apparently thought he was in love with Larson. Understandably, Larson found this behavior frightening. (Larson Tr. 1573-1579, 1589; ASIS Ex. 8, 84; Aly. Ex. 246; Magee Aly. Ex. 277 at 53-55 & Exs. M-8, M-11, M-12).

Complainant indicated an interest in two positions that came open at ASIS in the fall of 1994. The first position was that of Inspection Coordinator. (ASIS Ex. 33, Larson Tr. 1495-1497. Complainant did not have the minimum qualifications for that position. (Larson Tr. 1540-1542). The second position was Supervisor of Field Operations. (ASIS Ex. 43). This position required a minimum of ten years experience in NDE. (ASIS Ex. 44; Larson Tr. 1542-1546). Complainant did not meet the minimum qualifications for this position either. (Larson Tr. 1544-1546). There is nothing in the record to suggest that complainant, during the relevant periods, was qualified for anything more than an entry-level position as an NDE technician.

Because ASIS did not have appropriate work available, and, thus, was not able to recall complainant to work before June 30, 1995, he was terminated on that date pursuant to ASIS's established policy of retaining laid off employees on inactive status only until the end of the following season. (ASIS Ex. 3 at 0246; ASIS Ex. 74; Larson Tr. 1405-1406, 1585-1588; Carver Tr. 887).

Complainant submitted a printed resume dated June 23, 1995 and a handwritten job application dated July 1, 1995 to Alyeska for a position as an Alyeska Employee Concerns Program Representative. These documents contained many misstatements of fact.

The resume (Aly. Ex. 208) states that complainant is a graduate of Houghton Lake High School in Michigan. Complainant in fact only completed the 9th grade there, in 1981, and took his GED exam after moving to Alaska. (R. Sipes Tr. 207-210, 601-603). His resume states that he attended Kirkland Community College in Michigan during the school year of 1980-1981, which presents the implausible fact situation of complainant attending junior college at age 15 after dropping out of high school in the ninth grade. On cross-examination, complainant admitted that he had only attended a summer program "for kids" at Kirkland Community College. (R. Sipes Tr. 601-603). While he did receive an AA degree from Kenai Community College in 1987, his representations that he only requires six additional credits to obtain his B.A. degree in business management are not true, as are his representations that he has ten years of human resource experience. (R. Sipes Tr. 604-608, 611, 664-668). Similarly, he was not employed by Alyeska in a position in which he was "responsible for coordination and enforcement of State and Federal Regulators for Human Resources Department, Alyeska Pipeline Service Company." (R. Sipes Tr. 611). His July 1, 1995 application (Aly. Ex. 212) erroneously states that he showed a Level III UT technician how to perform shear wave on flange inspection procedures (R. Sipes Tr. 612-613, 674-675); and, like his resume, asserts that he graduated in May 1983 from Houghton Lake High School. (R. Sipes Tr. 962-963). The

application also states that he can type 60 words per minute, although he has not done so since the ninth grade. (R. Sipes Tr. 963-964).

The position of Alyeska Employee Concerns Program Representative required a minimum education Level of a Bachelor's degree and four years of pertinent professional/technical experience. (Aly. Ex. 207). Complainant did not meet these minimum requirements. (Aly. Exs. 208, 212). Nearly 100 other people also applied for the position. Complainant was not selected. (Aly. Ex. 213).

Although complainant testified that he was "ready, willing and able" to go back to work during the entire period following his layoff on October 14, 1994, by ASIS (R. Sipes Tr. 543), he did not furnish the required medical release confirming that he could do so until June 5, 1995. This release was prepared by his family physician Dr. McIntosh. (Larson Tr. 1404-1405; ASIS Ex. 3 at 0230). The validity of this release is questionable, however, given the fact that, two months later, on August 4, 1995, he obtained a contradictory statement from Dr. McIntosh stating that he was under her care and had been unable to work since June 30, 1994. (Pl. Ex. 42; McIntosh Tr. 369; R. Sipes Tr. 543-547). The purpose of that statement was to avert the collection of his student loans by the State of Alaska. (R. Sipes Tr. 543-547).

In July, 1995, ASIS offered complainant re-employment as an NDE technician performing UT testing on Air Force storage tanks, a job unrelated to the ASIS-Alyeska contract. Complainant was permitted to take the Level II NDE examination, which, after an initial failure, he was allowed to take again after coaching by Ron Walpoll, an ASIS Corporate Level III NDE technician. He then passed the examination. Although he lacked the 40 hours of classroom training required before he could be certified as a NDE Level II-T UT technician for the ASIS-Alyeska contract, ASIS was satisfied that he was qualified for the Air Force job. (Larson Tr. 1591-1596; R. Sipes Tr. 525-526). Complainant failed to report to the Air Force job, however. (Larson Tr. 1596; R. Sipes Tr. 733-738). He testified that he did so because, among other things, he was afraid he was being "set up" by ASIS. (R. Sipes Tr. 737-738; see also Tr. 525-534, 733-738).

Complainant worked for CTI of Alaska for two weeks in September 1995 and four days in November 1995. (R. Sipes Tr. 534-535; 616-618; Pl. Ex. 108).

Complainant testified that he was promised employment by LoAnn Larson of ASIS as General Manager and in the Human Resources Department; by Brett Tyner of Alyeska as an inspection coordinator at ASIS; and Marilyn Schaumberg, a state worker's compensation insurance adjuster, in the ASIS Human Resources Department. Complainant also testified that Peter Katchmar of the U.S. DOT told Brett Tyner of Alyeska to get him a job and that his psychiatrist, Dr. Magee, also promised him a job. (R. Sipes Tr. 628-631, 634, 639, 641-642, 701-703, 706; Pl. Ex. 105 at 00208). Larson, Tyner and Magee denied making such offers. Dr. Magee began to suspect that complainant was "delusional" after complainant accused him of failing to deliver on his promises during a telephone conversation in July 1995. (Pl. Ex. 105 at 00208; Dr. Magee Aly. Ex. 277 at 64-67; Larson Tr. 1491-1493; Tyner Tr. 2440-2441). On July 14, 1994, Complainant told Dr. Magee that he had taken 135 college credits and had obtained

three associate degrees. Pl. Ex. 105 at 00197; Aly. Ex. 277 at 12-13 (Magee). Complainant conceded on cross-examination that this was not true. (R. Sipes Tr. 625-626). There was no evidence to support complainant's claims about Schaumberg and Katchmar.

Complainant pointed to the experience of NDE technicians Kris Spaid and Shawn Zukes as evidence that there were appropriate jobs open which ASIS deliberately withheld and that the change in certification requirements for PITBUS NDE technicians was pretextual.

Kris Spaid was assigned by ASIS to work on the PITBUS in November or December of 1994 to replace Shawn Zuke, who wanted some time off. At the time, he was a Level I. He had taken the 40 hours of classroom training required to become a Level II-T, but not the examination. (Spaid Tr. 162-164). ASIS also assigned him in June or July of 1995 to work as a Level I UT technician at the Valdez terminal. (Spaid Tr. 165-166). He received his Level II-T UT certification shortly before the hearing in this case. (Spaid Tr. 133-134, 175). Shawn Zuke, a Level II-T, worked on the PITBUS from approximately September 27, 1994 to February 1995. She worked on the Mainline Digs from February 1995 until June 1995. She was laid off for the summer but was then offered a job for 12 weeks straight on the PITBUS crew.

Due to downsizing at Alyeska, the amount of inspection work available to ASIS under its contract with Alyeska declined sharply at the beginning of the 1995 construction season. (Carver, ALJX 9, 6/12/96 unofficial Tr. at 361-362; Tr. 914-917). The revenue available to ASIS pursuant to its contract with Alyeska decreased from \$11-\$12 million in 1994 to \$3-\$5 million in 1995. (Carver, ALJX 9, 6/12/96 unofficial Tr. at 361-362). Overall ASIS employment declined by over 50% in 1995. (Carver, ALJX 9, 6/12/96 unofficial Tr. at 362; ASIS Ex. 74; Larson Tr. 1585-1588). John Dayton, the Senior Vice President of Operations for Alyeska, oversees all of the operations of the Trans-Alaska Pipeline System. (Dayton Tr. 1173-1175). He agreed that additional oil discoveries and better recovery of oil from existing reserves may increase oil production and employment, but was uncertain as to when this might occur. (Dayton Tr. 1206-1207). Brian Stickler testified that the PITBUS work decreased markedly after 1994, to a 14 to 16 week assignment in 1995, and an eight week assignment in 1996.

Both Harry Hawkins and Bud Hawkins resigned from ASIS in early 1995. Harry left in January 1995 to get work closer to his home in Tennessee. (H. Hawkins Pl. Ex. 125 at 153). Bud left in March 1995 because ASIS was cutting back its payroll and he wanted to go back to where it was warm. (B. Hawkins Pl. Ex. 125 at 43).

DISCUSSION

In opposition to the complainant's claims, the respondents raise numerous issues. They argue that the complaint should be dismissed: (1) for lack of subject matter jurisdiction because none of the concerns complainant raised are grounded in conditions constituting reasonably perceived violations of any of the environmental statutes on which complainant relies; and (2) for untimeliness, to the extent that complainant's claims are based on adverse employment actions that occurred more than 30 days before November 14, 1994, the day complainant filed his complaint with Wage-Hour. The respondents also argue that: (3) complainant has failed to prove all of the elements of a prima facie case; (4) each respondent has met its burden of

producing evidence of legitimate nondiscriminatory reasons for its treatment of complainant; and (5) complainant has failed to demonstrate that those reasons were pretextual. With respect to any relief available to complainant if liability is found, Alyeska argues that: (6) complainant is not entitled to back or front pay after the day in July 1995 when he failed to accept the position ASIS offered performing UT inspection work at a military base in Alaska; (7) VECO has no liability after August 24, 1994, because VECO had no involvement in any employment decision affecting Sipes after that date; (8) complainant is not entitled to front pay because (a) he has not made a showing that reinstatement is impossible because of hostility between the parties and (b) he has failed to mitigate damages because he declined the ASIS job offer in July 1995; and (9) complainant has failed to prove his entitlement to compensatory damages. (Respondents' Proposed Findings of Fact and Conclusions of Law at 60-63). Respondents also urge that they are not co-employers as complainant argues.

I base my recommended decision to deny the complaint on the ground that claimant has failed to prove by a preponderance of the evidence that the respondents retaliated against him for his alleged protected activity. It is therefore unnecessary to reach the other issues raised by the parties.

Alleged Acts of Discrimination

Assuming without deciding that all the acts of discrimination alleged by complainant are timely based on the theory of a continuing violation, I find that the acts of discrimination at issue here, as indicated at pp. 61-62 of the complainant's post-hearing brief, are as follows:

(1) Removal of Richard Sipes from his work crew on the PITBUS.

This act occurred on June 28 or June 29, 1994, at the time the PITBUS crew requirement change was implemented.

(2) Failure to discipline or seriously reprimand Harry Hawkins.

This act occurred on June 24, 1994, when Carver and Larson met with Hawkins and warned him that further allegations of harassment or intimidation could be grounds for disciplinary action, but took no disciplinary action.

(3) Concluding from re-testing that there was no evidence that Harry Hawkins had falsified data readings on inspections performed at Pump Station 10.

This act occurred on August 18, 1994, with the issuance of the Whedbee and McKnight report concluding that there was no evidence of such falsification by Harry Hawkins. (Pl. Ex. 47).

(4) Modifying the PITBUS NDE crew requirements to permit Level II-Ts.

This act occurred on August 24, 1994, when ASIS General Manager Carver readjusted the requirements to permit NDE staffing on each shift by a Level II and a Level II-T technician.

(5) Assigning Sipes to the mainline digs from August 23, 1994 to September 30, 1994 while leaving Harry Hawkins on the PITBUS.

On September 30, 1994, ASIS supervisor Erickson told complainant that the mainline digs were finished for the year and he would no longer be working on the project.

(6) The failure to bring Sipes off layoff status for a one-week replacement assignment in December, 1994.

I note that these are fewer acts of discrimination than those originally alleged by the complainant and those explored during the hearing. I assume that this is so because, in reviewing the record, counsel for the complainant decided that it would be advisable to reduce the number of allegations he would be required to prove.

Under the burdens of persuasion and production in whistleblower proceedings, the complainant first must present a prima facie case. In order to establish a prima facie case, a complainant must show that: (1) the complainant engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against him. The complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Complainant may counter respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. In any event, the complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law.

Once the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, the rebuttable presumption created by complainant's prima facie showing drops from the case. The answer to the question of whether the plaintiff has presented a prima facie case is then "no longer particularly useful." The trier of fact has before it all the evidence it needs to determine whether the defendant intentionally discriminated against the plaintiff. Thus, the question becomes whether a complainant has proved by a preponderance of the evidence that the respondents retaliated against him for his alleged protected activity. Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y Feb. 15, 1995) slip op. at 6-7, aff'd sub nom. Carroll v. United States Department of Labor, 78 F. 3d 352, 356 (8th Cir. 1996). The complainant must demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or that the proffered explanation is not worthy of credence. Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y January 18, 1996) slip op. at 9-10. The proof must go beyond disbelief of the respondents; the factfinder must believe the complainant's explanation of intentional discrimination. Fradley v. Tennessee Valley Authority, 92-ERA-19 and 34 (Sec'y October 23, 1995).

Assuming arguendo that complainant has met his burden of establishing a prima facie case of a continuing violation, however, this is a situation in which the complainant has not met

his burden to convince this factfinder that he was subject to intentional discrimination as a whistleblower. Before discussing each alleged discriminatory act, a few comments about the reliability of the complainant is in order, as is the reception of evidence in the case.

I did not find the complainant to be a credible witness, based on his implausible and unproven testimony of job offers from ASIS for jobs such as general manager for which he was clearly unqualified, gross misstatements of fact on his resumes, which he too readily blamed on the resume company which helped him compose the resumes, his admissions of confusion and “doing all kinds of weird things” in the field in the fall of 1994, his utterly inappropriate and abusive behavior toward ASIS personnel director LoAnn Larson during that time, his threat to ASIS general manager Carver, his undisputed statements to Harry Hawkins that he would like to sue a company such as Alyeska and live off the proceeds of a court award, and his procurement of contradictory medical statements as to his ability to work.

With respect to the evidence received, respondents have argued vigorously throughout this proceeding that the formal rules of evidence set forth in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges at 29 C.F.R. §18.101 et seq. should apply, rather than the regulation set forth at 29 C.F.R. §24.5 (e)(1). That regulation provides as follows:

(e) Procedures, evidence and record--(1) Evidence. Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied. The Administrative Law Judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

The Administrative Review Board (ARB) considered this issue after the hearing in this matter was conducted. Seater v. Southern California Edison Co., 95 ERA 13 (ARB Sept. 27, 1996)(Slip op. at 6 n. 8), The case was remanded because the Administrative Law Judge had excluded evidence which the Board determined was probative. The ARB ruled that Section 24.5 (e)(1) was controlling as the specific program provision, because it was promulgated under the statutory employee protection provisions. Under that provision, probative evidence may be excluded only if it is unduly repetitious. The Board noted that this provision is in accord with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), and was also “consistent with the nature of the evidence presented in a circumstantial evidence case of retaliatory intent, some of which may appear to be of little probative value until the evidence is considered as a whole.” Accordingly, I adhere to my prior ruling that evidence objected to by the parties as inadmissible hearsay or otherwise objectionable was properly received in evidence.

(1) Removal of Richard Sipes from the PITBUS work crew.

I find that complainant has not proven that increased productivity, the rationale for upgrading of both NDE PITBUS technicians to a Level II, which resulted in his removal shortly after his complainant about Harry Hawkins, was a pretext for discrimination. The PITBUS program was new. It had only been in operation for two months at the time of the crew requirement change. It was also very expensive. Its overall expense in 1994 was expected to be approximately \$1 million. Any down time for the operation was therefore highly undesirable. Because of this expense, and the fact that this was the first field tour of duty for the PITBUS, I

find that speed in making changes in the program was not probative of discriminatory motive as complainant argues but rather of the respondents' attempt to gain maximum productivity as soon as possible in an expensive new program. I therefore find it unsurprising that the crew change requirement was made quickly. Level Is could not work independently, but had to be supervised by at least a Level II. Staffing with two level IIs permitted the operation to continue if one of the technicians were ill or unable to work for any reason, or were called away to handle other priority projects such as shear wave testing on pipeline flanges.

Complainant argues that these concerns were not justified as individuals did not become sick on the pipeline and there was little flange testing. I disagree, as the evidence shows that a major flange testing program was launched in 1994, although it subsequently did not prove workable, and it could reasonably be anticipated that, although incidents of illness may not have occurred in the past, this would not continue indefinitely. There was also credible testimony that the individuals who took part in the change in the crew requirements did not expect that complainant would lose his job because of the availability of other work on the pipeline. I note that discussions about the change in crew requirements frankly included concerns about the timing of the change in view of complainant's airing of his concerns. I find it highly unlikely that such discussions would have been so frank and candid if the participants' motives were, in fact, discriminatory. I also note that even Richard Lawson, the Alyeska contract engineer who expressed some concern about the change being made because the Level Is were "raising hell," ultimately agreed that it was a good and non-discriminatory decision to require two fully qualified Level II NDE technicians in the field.

(2) Failure to discipline or seriously reprimand Harry Hawkins.

I find nothing unreasonable or discriminatory about the failure to take disciplinary action against Harry Hawkins, inasmuch as the charges by complainant of physical threats were flatly denied by Hawkins and unsupported other than by complainant's testimony and hearsay statements by co-workers who disliked Hawkins or had other reasons to give less than candid testimony, as discussed above. In addition, there is no evidence that ASIS had previously received similar complaints about Hawkins' behavior or supposed falsification of data, Hawkins was ultimately cleared of the charges of falsification, and no additional complaints were received against Hawkins. I find insufficient evidence to prove that Harry Hawkins did in fact physically threaten complainant, even though he was ultimately found to have a personality that might be viewed as intimidating to subordinates. I find it particularly significant that complainant did not mention any physical threats by Hawkins in his complaining calls to Hammond and Carver shortly before his departure from the PITBUS on June 22, 1994, although this would have been the obvious occasion to do so.

I give little weight to Curtis Sipes' testimony about various bad experiences he had had with Harry Hawkins some years before, because much of his testimony is hearsay and because of his obvious motivation to dissemble. Curtis must have been well aware of the financial gain his family would receive if complainant won this lawsuit, and the possibility that he would no longer have to contribute half of his salary to his family's support. Similarly, I find that Bud Hawkins' testimony included much hearsay, and that he personally disliked Harry Hawkins, saw him as a

competitor, and believed he was being made to “look bad” by Harry’s greater grid production. He was therefore motivated by personal animus in encouraging complainant to make his initial complaint about Harry to ASIS supervisor Rusty Hammond in Fairbanks, and in his testimony generally. There was also little love lost between Shawn Zuke, Kris Spaid and Harry Hawkins.

Finally, I note that the allegations against Harry Hawkins were not ignored, because he was expressly warned by ASIS management that any further complaints of harassment would lead to disciplinary action. I find that this was adequate and appropriate remedial action under the circumstances, particularly in view of complainant’s failure to report Harry Hawkins’ alleged physical threats to ASIS management.

(3) Concluding from re-testing that there was no evidence that Harry Hawkins had falsified data readings on inspections performed at Pump Station 10.

I find nothing unreasonable or discriminatory about the conclusion of the re-testing. It was reached after careful and thorough planning of the methodology of an audit of the testing at Pump Station 10 by government as well as Alyeska and ASIS representatives, including three representatives from the Joint Pipeline Office, and a representative from the Department of Transportation Office of Pipeline Safety. In addition to ASIS and Alyeska representatives, the audit team itself included a JPO representative, two UT specialists, Jim Whedbee and Bill McKnight, employed by Stone & Webster and Raytheon, respectively. Complainant was also personally consulted about appropriate locations for retesting. There is no evidence that he protested the allegedly overly limited scope of the retesting.

Complainant points in particular to the failure to compare 1994 data with 1993 data at Pump Station 10 to see if they matched. I do not find this omission significant. As Bud Hawkins testified, unless substantial corrosion had occurred between 1993 and 1994, if a competent technician had made the readings in 1993, those readings might also be correct in 1994 in the absence of significant corrosion. Any duplication of the prior year’s readings would therefore be of little consequence. This testimony was also supported by that of Kirk Hastain and Brian Stickler.

(4) Modifying the PITBUS NDE crew requirements to permit Level II-Ts.

I find no intent to discriminate against complainant in making this change. Rather, the change reflected a valid business judgment by Alyeska that the move to staffing the PITBUS with two Level II NDE technicians had not been entirely successful, because it overconstrained the ability of ASIS to meet its contractual obligations for corrosion testing and inspection on the pipeline. It also reflected a valid business judgment by ASIS’ general manager Carver that, in the interest of accommodating the customers’ desires to maintain productivity, by having two NDE technicians who could work independently if needed, the staffing pattern should continue to include two Level IIs, of which one could be a Level II-T. Complainant has failed to demonstrate that these business judgments were pretextual.

(5) Assigning Sipes to the mainline digs from August 23, 1994 to September 30, 1994 while leaving Harry Hawkins on the PITBUS.

Inasmuch as Harry Hawkins had the proper certification for continuing to work on the PITBUS, and Sipes did not, and I have already found no discrimination in the change in certification requirements for the PITBUS, I find nothing discriminatory about not reassigning complainant to the PITBUS. Rather, I find that his assignment to the mainline digs represented a sincere effort by ASIS to find work for him as quickly as possible following his removal from the PITBUS crew due to the imposition of new certification requirements. I note that he himself conceded on his claim for unemployment insurance that his layoff was due to lack of work and that many other ASIS employees were placed in layoff status between July 1 and December 31, 1994.

(6) The failure to bring Sipes off layoff status for a one-week replacement assignment in December, 1994.

On October 14, 1994, while processing Sipes' layoff from the mainline digs, LoAnn Larson imposed a requirement that he submit a medical release before returning to active duty status. In view of complainant's bizarre and threatening behavior, as discussed above, I find that this request was perfectly reasonable. Because complainant failed to submit a medical release until June 5, 1995, and, as discussed above, the release was probably not valid, I find nothing discriminatory about the fact that he was not brought back from layoff in December, 1994.

Finally, in April of 1997, ASIS filed a motion to supplement the record to indicate that it has shut down because it lost its contract to provide inspection services on the pipeline in late December, 1996. This allegedly affects its ability to reinstate complainant or provide front pay in the event that liability is found. Complainant then filed an opposition to ASIS' motion attaching exhibits which Alyeska then moved to strike. In view of my disposition of this case, however, since there is no liability to the complainant, I find it unnecessary to resolve these motions.

RECOMMENDED ORDER

It is hereby ORDERED that:

The complaint of Richard Sipes is DENIED.

EDITH BARNETT
Administrative Law Judge

EB:bdw

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. See 61 Fed. Reg. 19978 and 19982 (1996).